CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 36 JANUARY 23, 2002 NO. 4

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 02–02)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE:
JANUARY 1, 2002 THROUGH MARCH 31, 2002

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.514500
Brazil	Real	0.432900
Canada	Dollar	0.626017
China, P.R.	Yuan	0.120823
Denmark	Krone	0.121462
Hong Kong	Dollar	0.128238
India	Rupee	0.020717
Japan	Yen	0.007575
Malaysia	Ringgit	0.263158
Mexico	New Peso	0.109951
New Zealand	Dollar	0.422900
Norway	Krone	0.112644
Singapore	Dollar	0.539811
South Africa	Rand	0.080192
Sri Lanka	Rupee	0.010735
Sweden	Krona	0.097380
Switzerland	Franc	0.608865
Thailand	Baht	0.022624
United Kingdom	Pound Sterling	1.445100
Venezuela	Bolivar	0.001317

Dated: January 8, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 02–03)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List for December 2001

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): December 25, 2001.

Austria schilling:

December 1, 2001	$0.065100
December 2, 2001	.065100
December 3, 2001	.064657
December 4, 2001	.064664
December 5, 2001	.064359
December 6, 2001	.064795
December 7, 2001	.064715
December 8, 2001	.064715
December 9, 2001	.064715
December 10, 2001	.064563
December 11, 2001	.064708
December 12, 2001	.065006
December 13, 2001	.065231
December 14, 2001	.065231
December 15, 2001	.065231
December 16, 2001	.065725
December 17, 2001	.065696
December 18, 2001	.065544
December 19, 2001	.065384
December 20, 2001	.065202
December 21, 2001	.064417
December 22, 2001	.064417
December 23, 2001	.064417
December 24, 2001	.063756
December 25, 2001	.063756
December 26, 2001	.063792
December 27, 2001	.064265
December 28, 2001	.064112
December 29, 2001	.064112
December 30, 2001	.064112
December 31, 2001	.064686

Belgium franc:

December 1, 2001	$0.022206
December 2, 2001	.022206
December 3, 2001	.022055
December 4, 2001	.022058
December 5, 2001	.021953
December 6, 2001	.022102
December 7, 2001	.022075
December 8, 2001	.022075
December 9, 2001	.022075

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 2001 (continued):

Belgium franc (continued):

December 10, 2001	$0.022023
December 11, 2001	.022072
December 12, 2001	.022174
December 13, 2001	.022251
December 14, 2001	.022251
December 15, 2001	.022251
December 16, 2001	.022419
December 17, 2001	.022410
December 18, 2001	.022358
December 19, 2001	.022303
December 20, 2001	.022241
December 21, 2001	.021973
December 22, 2001	.021973
December 23, 2001	.021973
December 24, 2001	.021748
December 25, 2001	.021748
December 26, 2001	.021760
December 27, 2001	.021921
December 28, 2001	.021869
December 29, 2001	.021869
December 30, 2001	.021869
December 31, 2001	.022065

Finland markka:

December 1, 2001	$0.150663
December 2, 2001	.150663
December 3, 2001	.149637
December 4, 2001	.149654
December 5, 2001	.148947
December 6, 2001	.149956
December 7, 2001	.149771
December 8, 2001	.149771
December 9, 2001	.149771
December 10, 2001	.149418
December 11, 2001	.149755
December 12, 2001	.150444
December 13, 2001	.150965
December 14, 2001	.150965
December 15, 2001	.150965
December 16, 2001	.152109
December 17, 2001	.152042
December 18, 2001	.151689
December 19, 2001	.151319
December 20, 2001	.150898
December 21, 2001	.149082
December 22, 2001	.149082
December 23, 2001	.149082
December 24, 2001	.147551
December 25, 2001	.147551
December 26, 2001	.147635
December 27, 2001	.148729
December 28, 2001	.148375
December 29, 2001	.148375
December 30, 2001	.148375
December 31, 2001	.149704

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 2001 (continued):

France franc:

December 1, 2001	$0.136564
December 2, 2001	.136564
December 3, 2001	.135634
December 4, 2001	.135649
December 5, 2001	.135009
December 6, 2001	.135924
December 7, 2001	.135756
December 8, 2001	.135756
December 9, 2001	.135756
December 10, 2001	.135436
December 11, 2001	.135741
December 12, 2001	.136366
December 13, 2001	.136838
December 14, 2001	.136838
December 15, 2001	.136838
December 16, 2001	.137875
December 17, 2001	.137814
December 18, 2001	.137494
December 19, 2001	.137158
December 20, 2001	.136777
December 21, 2001	.135131
December 22, 2001	.135131
December 23, 2001	.135131
December 24, 2001	.133744
December 25, 2001	.133744
December 26, 2001	.133820
December 27, 2001	.134811
December 28, 2001	.134491
December 29, 2001	.134491
December 30, 2001	.134491
December 31, 2001	.135695

Germany deutsche mark:

December 1, 2001	$0.458015
December 2, 2001	.458015
December 3, 2001	.454896
December 4, 2001	.454948
December 5, 2001	.452800
December 6, 2001	.455868
December 7, 2001	.455305
December 8, 2001	.455305
December 9, 2001	.455305
December 10, 2001	.454232
December 11, 2001	.455254
December 12, 2001	.457351
December 13, 2001	.458936
December 14, 2001	.458936
December 15, 2001	.458936
December 16, 2001	.462412
December 17, 2001	.462208
December 18, 2001	.461134
December 19, 2001	.460009
December 20, 2001	.458731
December 21, 2001	.453209
December 22, 2001	.453209
December 23, 2001	.453209

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 2001 (continued):

Germany deutsche mark (continued):

December 24, 2001	$0.448556
December 25, 2001	.448556
December 26, 2001	.448812
December 27, 2001	.452135
December 28, 2001	.451062
December 29, 2001	.451062
December 30, 2001	.451062
December 31, 2001	.455101

Greece drachma:

December 1, 2001	$0.002629
December 2, 2001	.002629
December 3, 2001	.002611
December 4, 2001	.002611
December 5, 2001	.002599
December 6, 2001	.002617
December 7, 2001	.002613
December 8, 2001	.002613
December 9, 2001	.002613
December 10, 2001	.002607
December 11, 2001	.002613
December 12, 2001	.002625
December 13, 2001	.002634
December 14, 2001	.002634
December 15, 2001	.002634
December 16, 2001	.002654
December 17, 2001	.002653
December 18, 2001	.002647
December 19, 2001	.002640
December 20, 2001	.002633
December 21, 2001	.002601
December 22, 2001	.002601
December 23, 2001	.002601
December 24, 2001	.002575
December 25, 2001	.002575
December 26, 2001	.002576
December 27, 2001	.002595
December 28, 2001	.002589
December 29, 2001	.002589
December 30, 2001	.002589
December 31, 2001	.002612

Ireland pound:

December 1, 2001	$1.137431
December 2, 2001	1.137431
December 3, 2001	1.129686
December 4, 2001	1.129813
December 5, 2001	1.124480
December 6, 2001	1.132098
December 7, 2001	1.130702
December 8, 2001	1.130702
December 9, 2001	1.130702
December 10, 2001	1.128035
December 11, 2001	1.130575
December 12, 2001	1.135781
December 13, 2001	1.139717

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 2001 (continued):

Ireland pound (continued):

December 14, 2001	$1.139717
December 15, 2001	1.139717
December 16, 2001	1.148351
December 17, 2001	1.147843
December 18, 2001	1.145177
December 19, 2001	1.142383
December 20, 2001	1.139209
December 21, 2001	1.125496
December 22, 2001	1.125496
December 23, 2001	1.125496
December 24, 2001	1.113941
December 25, 2001	1.113941
December 26, 2001	1.114576
December 27, 2001	1.122829
December 28, 2001	1.120163
December 29, 2001	1.120163
December 30, 2001	1.120163
December 31, 2001	1.130194

Italy lira:

December 1, 2001	$0.000463
December 2, 2001	.000463
December 3, 2001	.000459
December 4, 2001	.000460
December 5, 2001	.000457
December 6, 2001	.000460
December 7, 2001	.000460
December 8, 2001	.000460
December 9, 2001	.000460
December 10, 2001	.000459
December 11, 2001	.000460
December 12, 2001	.000462
December 13, 2001	.000464
December 14, 2001	.000464
December 15, 2001	.000464
December 16, 2001	.000467
December 17, 2001	.000467
December 18, 2001	.000466
December 19, 2001	.000465
December 20, 2001	.000463
December 21, 2001	.000458
December 22, 2001	.000458
December 23, 2001	.000458
December 24, 2001	.000453
December 25, 2001	.000453
December 26, 2001	.000453
December 27, 2001	.000457
December 28, 2001	.000456
December 29, 2001	.000456
December 30, 2001	.000456
December 31, 2001	.000460

Luxembourg franc:

December 1, 2001	$0.022206
December 2, 2001	.022206
December 3, 2001	.022055

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 2001 (continued):

Luxembourg franc (continued):

December 4, 2001	$0.022058
December 5, 2001	.021953
December 6, 2001	.022102
December 7, 2001	.022075
December 8, 2001	.022075
December 9, 2001	.022075
December 10, 2001	.022023
December 11, 2001	.022072
December 12, 2001	.022174
December 13, 2001	.022251
December 14, 2001	.022251
December 15, 2001	.022251
December 16, 2001	.022419
December 17, 2001	.022410
December 18, 2001	.022358
December 19, 2001	.022303
December 20, 2001	.022241
December 21, 2001	.021973
December 22, 2001	.021973
December 23, 2001	.021973
December 24, 2001	.021748
December 25, 2001	.021748
December 26, 2001	.021760
December 27, 2001	.021921
December 28, 2001	.021869
December 29, 2001	.021869
December 30, 2001	.021869
December 31, 2001	.022065

Netherlands guilder:

December 1, 2001	$0.406496
December 2, 2001	.406496
December 3, 2001	.403728
December 4, 2001	.403774
December 5, 2001	.401868
December 6, 2001	.404590
December 7, 2001	.404091
December 8, 2001	.404091
December 9, 2001	.404091
December 10, 2001	.403138
December 11, 2001	.404046
December 12, 2001	.405906
December 13, 2001	.407313
December 14, 2001	.407313
December 15, 2001	.407313
December 16, 2001	.410399
December 17, 2001	.410217
December 18, 2001	.409264
December 19, 2001	.408266
December 20, 2001	.407132
December 21, 2001	.402231
December 22, 2001	.402231
December 23, 2001	.402231
December 24, 2001	.398101
December 25, 2001	.398101
December 26, 2001	.398328

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 2001 (continued):

Netherlands guilder (continued):

December 27, 2001	$0.401278
December 28, 2001	.400325
December 29, 2001	.400325
December 30, 2001	.400325
December 31, 2001	.403910

Portugal escudo:

December 1, 2001	$0.004468
December 2, 2001	.004468
December 3, 2001	.004438
December 4, 2001	.004438
December 5, 2001	.004417
December 6, 2001	.004447
December 7, 2001	.004442
December 8, 2001	.004442
December 9, 2001	.004442
December 10, 2001	.004431
December 11, 2001	.004441
December 12, 2001	.004462
December 13, 2001	.004477
December 14, 2001	.004477
December 15, 2001	.004477
December 16, 2001	.004511
December 17, 2001	.004509
December 18, 2001	.004499
December 19, 2001	.004488
December 20, 2001	.004475
December 21, 2001	.004421
December 22, 2001	.004421
December 23, 2001	.004421
December 24, 2001	.004376
December 25, 2001	.004376
December 26, 2001	.004378
December 27, 2001	.004411
December 28, 2001	.004400
December 29, 2001	.004400
December 30, 2001	.004400
December 31, 2001	.004440

South Korea won:

December 1, 2001	$0.000786
December 2, 2001	.000786
December 3, 2001	.000782
December 4, 2001	.000785
December 5, 2001	.000787
December 6, 2001	.000785
December 7, 2001	.000785
December 8, 2001	.000785
December 9, 2001	.000785
December 10, 2001	.000780
December 11, 2001	.000782
December 12, 2001	.000785
December 13, 2001	.000785
December 14, 2001	.000778
December 15, 2001	.000778
December 16, 2001	.000778

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 2001 (continued):

South Korea won (continued):

December 17, 2001	$0.000773
December 18, 2001	.000774
December 19, 2001	.000774
December 20, 2001	.000769
December 21, 2001	.000764
December 22, 2001	.000764
December 23, 2001	.000764
December 24, 2001	.000764
December 25, 2001	.000764
December 26, 2001	.000759
December 27, 2001	.000752
December 28, 2001	.000756
December 29, 2001	.000756
December 30, 2001	.000756
December 31, 2001	.000761

Spain peseta:

December 1, 2001	$0.005384
December 2, 2001	.005384
December 3, 2001	.005347
December 4, 2001	.005348
December 5, 2001	.005323
December 6, 2001	.005359
December 7, 2001	.005352
December 8, 2001	.005352
December 9, 2001	.005352
December 10, 2001	.005339
December 11, 2001	.005351
December 12, 2001	.005376
December 13, 2001	.005395
December 14, 2001	.005395
December 15, 2001	.005395
December 16, 2001	.005436
December 17, 2001	.005433
December 18, 2001	.005421
December 19, 2001	.005407
December 20, 2001	.005392
December 21, 2001	.005327
December 22, 2001	.005327
December 23, 2001	.005327
December 24, 2001	.005273
December 25, 2001	.005273
December 26, 2001	.005276
December 27, 2001	.005315
December 28, 2001	.005302
December 29, 2001	.005302
December 30, 2001	.005302
December 31, 2001	.005350

Taiwan N.T. dollar:

December 1, 2001	$0.029011
December 2, 2001	.029011
December 3, 2001	.029019
December 4, 2001	.029019
December 5, 2001	.029019
December 6, 2001	.029019

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 2001 (continued):

Taiwan N.T. dollar (continued):

December 7, 2001	$0.029019
December 8, 2001	.029019
December 9, 2001	.029019
December 10, 2001	.029002
December 11, 2001	.029019
December 12, 2001	.029019
December 13, 2001	.029019
December 14, 2001	.028986
December 15, 2001	.028986
December 16, 2001	.028986
December 17, 2001	.028918
December 18, 2001	.028810
December 19, 2001	.028794
December 20, 2001	.028769
December 21, 2001	.028637
December 22, 2001	.028637
December 23, 2001	.028637
December 24, 2001	.028596
December 25, 2001	.028596
December 26, 2001	.028490
December 27, 2001	.028466
December 28, 2001	.028506
December 29, 2001	.028506
December 30, 2001	.028506
December 31, 2001	.028571

Dated: January 8, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 02–04)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR DECEMBER 2001

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 01–78 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): December 25, 2001.

Australia dollar:

December 1, 2001	$0.520300
December 2, 2001	.520300
December 3, 2001	.518300
December 5, 2001	.517000
December 6, 2001	.518200
December 12, 2001	.520100
December 13, 2001	.517900
December 14, 2001	.518600
December 15, 2001	.518600
December 16, 2001	.518600
December 17, 2001	.517600

Brazil real:

December 1, 2001	$0.397772
December 2, 2001	.397772
December 3, 2001	.406009
December 4, 2001	.412031
December 5, 2001	.412575
December 6, 2001	.412031
December 7, 2001	.416667
December 8, 2001	.416667
December 9, 2001	.416667
December 10, 2001	.426894
December 11, 2001	.426894
December 12, 2001	.421230
December 13, 2001	.418585
December 14, 2001	.418936
December 15, 2001	.418936
December 16, 2001	.418936
December 17, 2001	.423549
December 18, 2001	.426439
December 19, 2001	.436872
December 20, 2001	.431686
December 21, 2001	.425080
December 22, 2001	.425080
December 23, 2001	.425080
December 24, 2001	.427716
December 25, 2001	.427716
December 26, 2001	.431034
December 27, 2001	.428266

FOREIGN CURRENCIES—Variances from quarterly rates for December 2001 (continued):

Brazil real (continued):

December 28, 2001	$0.429923
December 29, 2001	.429923
December 30, 2001	.429923
December 31, 2001	.432526

Japan yen:

December 12, 2001	$0.007904
December 13, 2001	.007916
December 14, 2001	.007859
December 15, 2001	.007859
December 16, 2001	.007859
December 17, 2001	.007841
December 18, 2001	.007814
December 19, 2001	.007800
December 20, 2001	.007779
December 21, 2001	.007723
December 22, 2001	.007723
December 23, 2001	.007723
December 24, 2001	.007698
December 25, 2001	.007698
December 26, 2001	.007646
December 27, 2001	.007606
December 28, 2001	.007616
December 29, 2001	.007616
December 30, 2001	.007616
December 31, 2001	.007631

South Africa rand:

December 1, 2001	$0.097031
December 2, 2001	.097031
December 3, 2001	.096525
December 4, 2001	.094373
December 5, 2001	.092370
December 6, 2001	.091491
December 7, 2001	.089526
December 8, 2001	.089526
December 9, 2001	.089526
December 10, 2001	.090744
December 11, 2001	.090009
December 12, 2001	.089686
December 13, 2001	.086655
December 14, 2001	.081967
December 15, 2001	.081967
December 16, 2001	.081967
December 17, 2001	.082988
December 18, 2001	.081766
December 19, 2001	.080000
December 20, 2001	.073529
December 21, 2001	.080580
December 22, 2001	.080580
December 23, 2001	.080580
December 24, 2001	.083333
December 25, 2001	.083333
December 26, 2001	.083403
December 27, 2001	.084459

FOREIGN CURRENCIES—Variances from quarterly rates for December 2001 (continued):

South Africa rand (continued):

December 28, 2001	$0.083333
December 29, 2001	.083333
December 30, 2001	.083333
December 31, 2001	.083333

Dated: January 8, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

TREASURY ADVISORY COMMITTEE ON COMMERCIAL OPERATIONS OF THE U.S. CUSTOMS SERVICE

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of meeting.

SUMMARY: This notice announces the date, time, and location for the quarterly meeting of the Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service (COAC), and the provisional agenda for consideration by the Committee.

DATES: The next meeting of the Treasury Advisory Committee on Commercial Operations of the U.S. Customs Service will be held on Friday, January 25, 2002, starting at 8:45 a.m., 740 15th Street, Suite 700, Washington, DC. The duration of the meeting will be approximately four hours.

FOR FURTHER INFORMATION, CONTACT: Gordana S. Earp, Deputy Director, Tariff and Trade Affairs (Enforcement), Office of the Under Secretary (Enforcement), Telephone: (202) 622–0336.

At this meeting, the Advisory Committee is expected to pursue the following agenda. The agenda may be modified prior to the meeting.

Agenda:

1) Report on the work of the COAC sub-committee on Border Security and COAC recommendations
2) Status of proposed re-design of the Office of Rules & Regulations
3) Merchandise Processing Fee
4) Review of issues and priorities for 2002

SUPPLEMENTARY INFORMATION: The meeting is open to the public; however, participation in the Committee's deliberations is limited to Committee members, Customs and Treasury Department staff, and persons invited to attend the meeting for special presentations. A person other than an Advisory Committee member who wishes to attend the meeting should contact Theresa Manning at (202) 622–0220 or Helen Belt at (202) 622–0230.

Dated: January 4, 2002.

TIMOTHY E. SKUD,
Acting Deputy Assistant Secretary,
Regulatory, Tariff, and Trade.

[Published in the Federal Register, January 10, 2002 (67 FR 1405)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, January 9, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

DOUGLAS M. BROWNING,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF DECORATIVE STEEL CONTAINERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of a ruling letter and revocation of treatment relating to the tariff classification of decorative steel containers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of decorative steel containers and revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed modification of a ruling letter and revocation of treatment relating to tariff classification was published on November 28, 2001, in Vol. 35, No. 48, of the CUSTOMS BULLETIN. No comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 22, 2002.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Commercial Rulings Division, (202) 927–2391.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on November 28, 2001, in the CUSTOMS BULLETIN, Vol. 35, No. 48, proposing to modify a ruling letter, NY F86857 dated May 26, 2000, and revoke the tariff treatment pertaining to the tariff classification of steel containers. No comments were received in response to this notice.

As stated in the proposed notice, this modification will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to have advised the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY F86857 dated May 26, 2000, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the

analysis set forth in Headquarters Ruling Letter (HQ) 964477. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. HQ 964477, modifying NY F86857, and revoking its treatment relating to tariff classification, is set forth as the "Attachment" to this document.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: January 4, 2002.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 4, 2002.

CLA-2 RR:CR:GC 964477 KBR
Category: Classification
Tariff No. 7323.99.90

RICK MOSLEY
KUEHNE & NAGEL, INC.
101 Wrangler Drive
Suite 201
Coppell, TX 75019

Re: Reconsideration of NY F86857; Decorative Steel Containers.

DEAR MR. MOSLEY:

This is in reference to your letter dated August 14, 2000, on behalf of Tuesday Morning Partners, Ltd., in which you requested reconsideration of New York Ruling Letter (NY) F86857, issued to you by the Customs National Commodity Specialist Division, on May 26, 2000, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of, among other items, certain decorative steel containers. We have reviewed the prior ruling and have determined that the classification provided is incorrect.

Pursuant to sections 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice was published on November 28, 2001, in Vol. 35, No. 48 of the CUSTOMS BULLETIN, proposing to modify NY F86857. No comments were received in response to this notice. This ruling modifies NY F86857 by providing the correct classification for the decorative steel containers.

Facts:

In NY F86857 the subject articles were described as follows. The products involved are two styles of 'gold'-toned decorative steel containers. Style VV911729XQ (M110053) is 6 inches in diameter and 3 inches high. The side walls are cutouts of leaves and it has a wire mesh bottom with three ball-shaped legs attached to the bottom.

Style VV911729Q (S110017) is 4 inches in diameter and 3¼ inches high. The side walls are cutouts of trees, holly, reindeer and snowmen. It has a solid metal bottom with three ball-shaped legs attached to the bottom. You submitted for our examination, samples which match sample S110017 in design but are in medium and large sizes.

In NY F86857 it was determined that style M110053 was a household article of iron or steel, not coated or plated with precious metal, classifiable under subheading 7323.99.9060, HTSUS. Style S110017 was found to be a non-electrical lamp or lighting fitting classifiable under subheading 9405.50.4000, HTSUS. We have reviewed that ruling and determined that the classification of style S110017 in incorrect. This ruling sets forth the correct classification.

Issue:

What is the proper classification under the HTSUS of the subject decorative steel containers?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUS. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

7323	Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel;
	Other:
7323.99	Other:
	Not coated or plated with precious metal:
7323.99.90	Other
8306	Bells, gongs and the like, nonelectric, of base metal; statuettes and other ornaments, of base metal; photograph, picture or similar frames, of base metal; mirrors of base metal; and base meal parts thereof:
	Statuettes and other ornaments, and parts thereof:
8306.29.00	Other
9405	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
9405.50	Non-electrical lamps and lighting fittings:
	Other:
9405.50.40	Other

Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that in the absence of context to the contrary, a tariff classification controlled by use, other than actual use, is to be determined by the principal use in the United States at, or immediately prior to, the date of importation, of goods of the same class or kind of merchandise.

In *E.C. Lineiro v. United States*, 37 CCPA 10, CAD 411 (1949), the court states that "a designation by use may be established, although the word 'use' or 'used' does not appear in the language of the statute." As such, it is the use of the class or kind of merchandise to which the imported article belongs, which must be determined, not the "alleged" use of the instant merchandise.

The court in *E. M. Chemicals v. United States*, 20 C.I.T. 382, 923 F. Supp. 202 (1996 Ct. Intl. Trade) explained the application of these types of HTSUS provisions thus:

> When applying a "principal use" provision, the Court must ascertain the class or kind of goods which are involved and decide whether the subject merchandise is a member of that class. *See supra* Additional U.S. Rule of Interpretation 1 to the HTSUS. In determining the class or kind of goods, the Court examines factors which may include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4)

> the environment of the sale (e.g., the manner in which the merchandise is advertised and displayed); (5) the usage of the merchandise; (6) the economic practicality of so using the import; and (7) the recognition in the trade of this use. *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377, cert. denied, 429 U.S. 979, 50 L. Ed. 2d 587, 97 S. Ct. 490 (1976); *see also Lenox Coll.[v. United States]*, 20 C.I.T., Slip Op. 96–30, at page 5.

In your submission dated August 14, 2000, you state that the decorative steel containers are intended to be used "as festive candleholders during the Christmas holiday season." You state that the articles are composed of lightweight, low cost metal of nominal value and small bulk. You also state that they possess no utilitarian value and are used only as festive holiday decorations "to contain or support other decorative articles or add to their decorative effect." This indicates that you believe the containers may be used to hold articles other than just candles. We agree. Although the articles are capable of use as candleholders, as a class or kind of merchandise, the containers may be used in the same manner as other household containers, such as bowls, platters or serving dishes. The form of these articles does not belong to the class or kind of goods that includes lamps and lighting fittings. Therefore, we find that they are not candleholders classifiable under subheading 9405.50.40, HTSUS.

You then argue that if the decorative steel containers are not classifiable as candleholders, they should be classified as statuettes and other ornaments under heading 8306, HTSUS. The EN for 83.06 states:

> This group comprises a wide range of ornaments of base metal (whether or not incorporating subsidiary non-metallic parts) of a kind designed essentially for decoration, e.g., in homes, offices, assembly rooms, places of religious worship, gardens.
>
> It should be noted that the group does not include articles of more specific headings of the Nomenclature, even if those articles are suited by their nature or finish as ornaments.
>
> The group covers articles which have no utility value but are wholly ornamental, and articles whose only usefulness is to contain or support other decorative articles or to add to their decorative effect, for example:
>
> * * * * * * *
>
> (3) Table-bowls, vases, pots, jardinières (including those of cloisonné enamel).
>
> The group also includes, in the circumstances explained below, certain goods of the two following categories even though they have a utility value:
>
> (A) Household or domestic articles whether they are potentially covered by specific headings for such goods (i.e., headings 73.23, 74.18 and 76.16) or by the "other articles" headings (e.g., in the case of articles of nickel and tin in particular). These household or domestic articles are generally designed essentially to serve useful purposes, and any decoration is usually secondary so as not to impair the usefulness. If, therefore, such decorated articles serve a useful purpose no less efficiently than their plainer counterparts, they are classified as domestic goods rather than in this group. On the other hand, if the usefulness of the article is clearly subordinate to its ornamental or fancy character, it should be classified in this group, for example, trays so heavily embossed that their usefulness is virtually nullified; ornaments incorporating a purely incidental tray or container usable as a trinket dish or ash-tray; and miniatures having no genuine utility value (miniature kitchen utensils).

Examination of the samples indicates that they are inexpensively made. The side walls are crudely cut out and the designs are hard to distinguish. A user is not likely to use them alone as a decorative article without placing another decorative article in it. The decorations on the articles do not impair or nullify the articles' usefulness as a container. These containers may easily be used to serve breads, candies, or other items. Mere attractiveness and minor decorations do not convert a useful item into an ornamental article. The instant containers are not so decorated that their use would be less efficient than a plainer container. Further, we see no reason to distinguish one style from the other for classification purposes, as was done in NY F86857. Both styles (M110053 and S110017) are decorative steel containers whose usefulness is not subordinate to its ornamentation.

You cite HQ 955112 (February 14, 1994), where a silver-plated candelabra attached to a table bowl used to hold flowers as a table centerpiece was found to be classified under subheading 8306.21.00, HTSUS, which provides for statuettes and other ornaments and parts thereof, plated with precious metal. We do not find that case to be similar to the subject containers. In that case, the article was a combined article, both a candelabra and a

bowl, having a much more decorative effect. The bowl seemed to have only one use, as a decorative flower holder. The ruling stated that the "article's usefulness is subordinate to its decorative effect". In the instant case, the containers have multiple uses. There is no candelabra attached to accentuate any decorativeness the container might have. Unlike the article described in HQ 955112, it is more useful than decorative. Therefore, we find that both styles of steel containers are classifiable under subheading 7323.99.90, HTSUS, as table, kitchen or other household articles, of iron or steel, not coated or plated with precious metal, other.

Holding:

In accordance with the above discussion, the decorative steel containers, Style VV911729XQ (M110053) and Style VV911729Q (S110017), are classified in subheading 7323.99.90, HTSUS, as table, kitchen or other household articles, of iron or steel, not coated or plated with precious metal, other.

Effect on Other Ruling:

NY F86857, dated May 26, 2000, is MODIFIED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF TEXTILE DRAWSTRING POUCHES FOR GLASSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to the classification of textile drawstring pouches for glasses.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter relating to the classification of textile drawstring pouches for glasses. Similarly, Customs also is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published on December 5, 2001, in Vol. 35, No. 49, of the CUSTOMS BULLETIN. No comments were received in response to the notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 25, 2002.

FOR FURTHER INFORMATION CONTACT: Shari Suzuki, Textile Branch, (202) 927–2339.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published on December 5, 2001, in the CUSTOMS BULLETIN , Vol. 35, No. 49, proposing to revoke Headquarters Ruling Letter (HQ) 954403, dated November 16, 1993. No comments were received in response to the notice of proposed action.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on merchandise subject to this notice, should have advised the Customs Service during the notice period.

Similarly, pursuant to section 625 (c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions that is contrary to the position set forth in this notice. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking HQ 954403, dated November 16, 1993, and any other rulings not specifically identified, that is contrary to the position set forth in this notice, to reflect the proper classification of the merchandise pursuant to the analysis set

forth in Headquarters Ruling Letter HQ 963558 as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions that is contrary to the position set forth in this notice.

In accordance with 19 U.S.C. 1625 (c) this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: January 7, 2002.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, January 7, 2002.

CLA–2 RR:CR:TE 963558 SS
Category: Classification
Tariff No. 4202.32.9550

MR. SCOTT E. ROSENOW, ESQUIRE
STEIN SHOSTAK SHOSTAK & O'HARA
1620 L Street, N.W.
Washington, DC 20036

Re: Revocation of Headquarters Ruling Letter 954403; Drawstring Pouch for Sunglasses; Subheading 4202.32.9550, HTSUSA; Not Heading 6307, HTSUSA.

DEAR MR. ROSENOW:

On November 16, 1993, Customs issued Headquarters Ruling Letter (HQ) 954403 to you on behalf of your client, Brandon International, regarding the classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of a polyester drawstring pouch used as a container for sunglasses. This letter is to inform you that upon review of HQ 954403, it has been determined that the classification decision in HQ 954403 should be revoked.

HQ 954403, has been cited in several recent Headquarters Ruling Letters as being inconsistent with Customs position taken on merchandise classified in heading 6307, HTSUSA. See HQ 962551, dated June 16, 1999, and HQ 963575, dated October 12, 1999. This letter is to inform you that after review of the ruling, it has been determined that the classification of the textile drawstring pouch in HQ 954403 under subheading 6307.90.9986, HTSUSA, is incorrect. As such, HQ 954403 is revoked pursuant to the analysis which follows below.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI, (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on December 5, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 49, proposing to revoke HQ 954403 and any treatment pertaining to the classification of textile drawstring pouches for glasses. No comments were received in response to this notice.

Facts:

The drawstring pouch was described in HQ 954403 as follows:

> The sample is a 3½ by 7 inch drawstring pouch made of an ultra-fine polyester material. The pouch will be distributed to purchasers of sunglasses for the purpose of providing a container with a drawstring closure to secure the glasses inside.

Issue:

What is the proper classification of the polyester drawstring pouch for sunglasses?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings.

The competing provisions at issue in this case are heading 4202, HTSUSA, and heading 6307, HTSUSA. Heading 4202, HTSUSA, provides for, among other things, spectacle cases and similar containers. The EN state that subheading 4202.32, HTSUSA, covers articles of a kind normally carried in the pocket or in the handbag and includes spectacle cases, note cases (bill folds), wallets, purses, key cases, cigarette cases, cigar cases, pipe cases and tobacco pouches. Heading 6307, HTSUSA, provides for, among other things, other made up articles, and is a basket provision for articles not more specifically provided for elsewhere in the tariff.

Drawstring pouches have been classified under both heading 4202, HTSUSA, and heading 6307, HTSUSA, depending upon their construction and the purpose(s) for which they are designed. HQ 960135, dated July 11, 1997. Where a textile drawstring pouch is considered specially designed to hold an article and of adequate construction to be used repeatedly (rather than discarded), it is classifiable under heading 4202, HTSUSA. HQ 962551, dated June 16, 1999, and HQ 959524, dated November 4, 1996. If it is the kind of article to be carried in the pocket or handbag, with an outer surface of textile materials, it is classifiable under subheading 4202.32, HTSUSA. HQ 962551, dated June 16, 1999, and HQ 959524, dated November 4, 1996. Pouches classified outside heading 4202, HTSUSA, are generally those considered not specially designed to contain a particular article and not adequately constructed to sustain repeated use. HQ 960135, dated July 11, 1997.

More specifically, in the case of pouches or drawstring bags for glasses, Customs has been consistent in its determinations that such merchandise, when adequately constructed for repeated use is properly classified in heading 4202, HTSUSA. See HQ 964443, dated May 14, 2001, HQ 962551, dated June 16, 1999; HQ 960135, dated July 11, 1997; and HQ 959524; dated November 4, 1996. The instant drawstring pouch is adequately constructed for repeated use. Furthermore, the pouch is specially designed to suit the needs of the glasses it will carry. The dimensions of the pouch are more than adequate to snugly accommodate eyeglasses regardless of the absence of internal fittings or compartments. Additionally, the ultra-fine polyester fabric construction imparts a special feature to the subject merchandise in that it makes an ideal cleaning cloth for glasses. See HQ 960135, dated July 11, 1997, and HQ 959524, dated November 4, 1996. Thus, the instant drawstring bag is properly classified under heading 4202, HTSUSA.

In your submission, you cited a series of Customs rulings which you believe support your claim that the subject merchandise is classified under heading 6307, HTSUSA. We note that those rulings concern generic pouches (i.e., jewelry pouches, gift bags, etc.) which were determined to be of non-durable or insubstantial construction. They are distinguishable from the instant textile drawstring bag which is a substantially constructed pouch made of highly durable fabric specifically designed for glasses. In HQ 962551, Customs clarified that the durability and substantial nature of drawstring pouches are determinative factors to the classification of textile drawstring pouches. We note that even in HQ 954403, the instant drawstring pouch was described as adequately constructed for repeated used. Thus, Customs was incorrect in stating that the substantial nature of the drawstring pouch did not alter the conclusion. The substantiality of the drawstring pouch combined with its specially designed nature renders the article within the ambit of heading 4202, HTSUSA. Accordingly, the subject merchandise is properly classified in subheading 4202.32.9550, HTSUSA.

Holding:

HQ 954403, dated November 16, 1993, is hereby revoked.

The polyester drawstring pouch for sunglasses is properly classified in subheading 4202.32.9550, HTSUSA, which provides for, among other things, articles of a kind normally carried in the pocket or handbag: with outer surface of sheeting or plastic or of textile materials: other: other, of man-made fibers. The applicable rate of duty is 18.3 percent *ad valorem* and the textile category code is 670.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office. The Status Report on Current Import Quota (Restraint Levels) is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.treas.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF PORTABLE PROPANE GAS CAMPING STOVE AND HEATERS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letters and treatment relating to tariff classification of a portable propane gas camping stove and heaters.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two ruling letters pertaining to the tariff classification of merchandise under the Harmonized Tariff Schedule of the United States ("HTSUS"). One ruling letter pertains to the classification of a portable propane gas camping stove; the second ruling letter pertains to the classification of natural gas heaters and propane heaters. Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed actions was published in the CUSTOMS BULLETIN on November 28, 2001. The only comment received in response to the notice is discussed in the attached rulings.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after March 25, 2002.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, General Classification Branch, (202) 927–2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published in the CUSTOMS BULLETIN on November 28, 2001, proposing to revoke DD 815332, pertaining to the tariff classification of a portable propane gas camping stove, and to modify NY 803374, pertaining to the tariff classification of propane heaters. The only comment received in response to the notice is discussed in the attached rulings, HQ 964976 and HQ 965297. The issue raised in the comment, i.e., portability, has caused us to make an additional change to NY 803374 which results in the revocation of that ruling, rather than its modification.

As stated in the proposed notice, this revocation will cover any rulings on the subject merchandise which may exist but which have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel ap-

plying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking DD 815332, NY 803374, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 964976 and HQ 965297. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. HQ 964976 and HQ 965297 are set forth as Attachments A and B, respectively, to this document.

In accordance with 19 U.S.C. 1625(c), these rulings will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: January 8, 2002.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, January 8, 2002.

CLA–2 RR:CR:GC 964976 GOB
Category· Classification
Tariff No. 7321.11.10

DOUGLAS SHEWRING
AMERICAN LEISURE PRODUCTS COMPANY
P.O. Box 53
Newport, RI 02840

Re: Revocation of DD 815332; Portable Propane Gas Camping Stove.

DEAR MR. SHEWRING:

This letter is with respect to DD 815332 issued to you November 1, 1995, by the Port Director of Customs, San Diego, with respect to the classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of a portable propane gas camping stove. We have reviewed the classification set forth in DD 815332 and have determined that it is incorrect. Th.s ruling sets forth the correct classification.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed

modification of DD 815332, as described below, was published in the CUSTOMS BULLETIN on November 28, 2001.

One comment was received in response to the notice. The commenter expressed "no comment on the propriety of the proposal to consider liquid propane to be a gas fuel for purposes of classification in HTSUS heading 7321" but stated that the proposed rulings "fail to articulate sufficient explanation for classification of the subject articles as 'portable.' " With respect to the comment, we note that the portability of the propane gas camping stove is not at issue here. We note additionally that the good at issue here clearly appears to be portable.

Facts:

The article at issue was described in DD 815332 as follows:

> * * * an enameled steel portable propane gas camping or cooking stove with a brass gas valve and stainless steel burner. Additionally, it has pouring lips and carry handles (on each side). It is packed in a nylon carrying bag (stove folds away) with carry clasp and handles * * * the article utilizes an 11-pound disposable propane bottle (not included at time of importation).

In DD 815332, Customs classified the portable propane gas camping stove in subheading 7321.12.00, HTSUS, as: "Stoves, ranges, grates, cookers * * * and similar nonelectric domestic appliances, and parts thereof, of iron or steel: Cooking appliances and plate warmers: * * * For liquid fuel."

Issue:

What is the classification under the HTSUS of the portable propane gas camping stove?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. GRI 6 provides in pertinent part: "For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable."

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN's") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN's provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS provisions under consideration are as follows:

7321		Stoves, ranges, grates, cookers, (including those with subsidiary boilers for central heating), barbeques, braziers, gas rings, plate warmers and similar nonelectric domestic appliances, and parts thereof, of iron or steel:
		Cooking appliances and plate warmers:
7321.11		For gas fuel or for both gas and other fuels:
7321.11.10		Portable
*	*	* * * * * * *
7321.12.00		For liquid fuel.

EN 73.21 provides that that heading includes camping stoves.

The crucial issue in this classification matter is whether the subject article is a cooking appliance "for gas fuel or for both gas and other fuels" (subheading 7321.11.10, HTSUS) or "for liquid fuel" (subheading 7321.12.00, HTSUS).

The article is described as a portable propane gas camping stove. That description would seem to indicate that the article is a cooking appliance for gas fuel. We have examined the definitions of "propane" in various resources.

The *Van Nostrand Reinhold Encyclopedia of Chemistry* (4th ed., 1984) defines "propane" in pertinent part as follows: "* * * colorless gas [technical specifications omitted] * * * The content of propane in natural gas varies with the source of the natural gas, but on average is about 6%. Propane is also obtainable from petroleum sources. Liquefied pro-

pane is marketed as a fuel for outlying areas where other fuels may not be readily available and for portable cook stoves * * * Propane and other liquefied gases are clean and appropriate for most heating purposes * * *"

Hawley's Condensed Chemical Dictionary (12th ed., 1993) defines "propane" in pertinent part as follows: "* * * Properties: Colorless gas, natural-gas odor * * * an asphyxiant gas * * * Derivation: From petroleum and natural gas."

The Random House Dictionary of the English Language (unabridged ed., 1973) defines propane as follows: "a colorless, flammable gas [symbol omitted] of the alkane series, occurring in petroleum and natural gas: used chiefly as a fuel and in organic synthesis. Also called dimethylmethane."

We conclude from these authorities that propane is a gas, and not a liquid.

The HTSUS classifies propane in subheading 2711.12.00, HTSUS, as: "Petroleum gases and other gaseous hydrocarbons: Liquefied: * * * Propane." We interpret that classification to the effect that propane is a liquefied *gas*. EN 27.11 provides in pertinent part: "This heading covers **crude** gaseous hydrocarbons obtained as natural gases or from petroleum, or produced chemically. **Methane** and **propane** are, however, included even when pure. These hydrocarbons are gaseous at a temperature of 15 degrees C and under a pressure of 1,013 millibars (101.3 kPa). They may be presented under pressure as liquids in metal containers and are often treated, as a safety measure, by the addition of small quantities of highly odiferous substances to indicate leaks. They include, in particular, the following gases, whether or not liquefied: (1) Methane and propane, whether or not pure * * *" [Emphasis in original.] We interpret that language of the EN to the effect that propane is a gas.

Accordingly, we find that the article at issue, described as a portable propane gas camping stove, is a cooking appliance for gas fuel. Therefore, it is classified in subheading 7321.11.10, HTSUS.

This determination is consistent with the following rulings: HQ 950297 dated December 31, 1991, where Customs classified a catalytic safety heater which uses liquid propane gas in subheading 7321.81.50, HTSUS; and NY 838467 dated March 28, 1989, where Customs classified a table top gas grill fueled by low pressure liquefied petroleum gas in subheading 7321.11.10, HTSUS.

Holding:

The portable propane gas camping stove is classified in subheading 7321.11.10, HTSUS, as: "Stoves, ranges, grates, cookers * * * and similar nonelectric domestic appliances, and parts thereof, of iron or steel: Cooking appliances and plate warmers: For gas fuel or for both gas and other fuels: Portable."

Effect on Other Rulings:

DD 815332 is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 8, 2002.
CLA–2 RR:CR:GC 965297 GOB
Category: Classification
Tariff No. 7321.81.10 and 7321.81.50

STACI ROBINSON
LEP PROFIT INTERNATIONAL, INC.
16038 Vickery
Suite 2000
Houston, TX 77032

Re: Revocation of NY 803374; Heaters.

DEAR MS. ROBINSON:

This letter is with respect to NY 803374 issued to you on November 9, 1994, on behalf of the Dearborn Company, Inc., by the Customs Area Director, New York Seaport, with respect to the classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of propane heaters (model nos. DIR18LP and DIR30LP). We have reviewed the classifications of the propane heaters set forth in NY 803374 and have determined that it is incorrect. This ruling sets forth the correct classification.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY 803374, as described below, was published in the CUSTOMS BULLETIN on November 28, 2001.

One comment was received in response to the notice. The commenter expressed "no comment on the propriety of the proposal to consider liquid propane to be a gas fuel for purposes of classification in HTSUS heading 7321" but stated that the proposed rulings "fail to articulate sufficient explanation for classification of the subject articles as 'portable.'" We will address the portability issue in the LAW AND ANALYSIS section of this ruling.

Facts:

The articles at issue were described in NY 803374 as follows:

> The merchandise is the Dearborn Infrared Heater, model numbers DIR18N, DIR30N, DIR18LP, and DIR30LP. All models are vent-free, steel heaters that can be floor or wall mounted. The heater is available in two sizes, 18,000 Btu and 30,000 Btu. Models DIR18N and DIR30N are fueled by natural gas. Models DIR18LP and DIR30LP are fueled by liquid propane.

In NY 803374, Customs classified the natural gas heaters in subheading 7321.81.10, HTSUS, as: "Stoves, ranges, grates, cookers * * * and similar nonelectric domestic appliances, and parts thereof, of iron or steel: * * * Other appliances: * * * For gas fuel or for both gas and other fuels: Portable." In the same ruling, Customs classified the propane heaters in subheading 7321.82.10, HTSUS, as: "Stoves, ranges, grates, cookers * * * and similar nonelectric domestic appliances, and parts thereof, of iron or steel: * * * Other appliances: * * * For liquid fuel: Portable."

Issue:

What is the classification under the HTSUS of the subject heaters?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied. GRI 6 provides in pertinent part: "For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable."

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN's") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN's provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS provisions under consideration are as follows:

7321	Stoves, ranges, grates, cookers, (including those with subsidiary boilers for central heating), barbeques, braziers, gas rings, plate warmers and similar nonelectric domestic appliances, and parts thereof, of iron or steel:
	Other appliances:
7321.81	For gas fuel or for both gas and other fuels:
7321.81.10	Portable
7321.81.50	Other
* * * * * * *	
7321.82	For liquid fuel:
7321.82.10	Portable
7321.82.50	Other

The natural gas heaters are not portable as they must be connected to a gas source. Accordingly, we find that they are classified in subheading 7321.81.50, HTSUS.

With respect to the liquid propane heaters, the crucial issue is whether the subject articles are appliances "for gas fuel or for both gas and other fuels" (subheading 7321.81, HTSUS) or "for liquid fuel" (subheading 7321.82, HTSUS). We have examined the definitions of "propane" in various resources.

The *Van Nostrand Reinhold Encyclopedia of Chemistry* (4th ed., 1984) defines "propane" in pertinent part as follows: "* * * colorless gas [technical specifications omitted] * * * The content of propane in natural gas varies with the source of the natural gas, but on average is about 6%. Propane is also obtainable from petroleum sources. Liquefied propane is marketed as a fuel for outlying areas where other fuels may not be readily available and for portable cook stoves * * * Propane and other liquefied gases are clean and appropriate for most heating purposes * * *"

Hawley's Condensed Chemical Dictionary (12th ed., 1993) defines "propane" in pertinent part as follows: "* * * Properties: Colorless gas, natural-gas odor * * * an asphyxiant gas * * * Derivation: From petroleum and natural gas."

The Random House Dictionary of the English Language (unabridged ed., 1973) defines propane as follows: "a colorless, flammable gas [symbol omitted] of the alkane series, occurring in petroleum and natural gas: used chiefly as a fuel and in organic synthesis. Also called dimethylmethane."

We conclude from these authorities that propane is a gas, and not a liquid.

The HTSUS classifies propane in subheading 2711.12.00, HTSUS, as: "Petroleum gases and other gaseous hydrocarbons: Liquefied: * * * Propane." We interpret that classification to the effect that propane is a liquefied *gas*.

EN 27.11 provides in pertinent part: "This heading covers **crude** gaseous hydrocarbons obtained as natural gases or from petroleum, or produced chemically. **Methane** and **propane** are, however, included even when pure. These hydrocarbons are gaseous at a temperature of 15 degrees C and under a pressure of 1,013 millibars (101.3 kPa). They may be presented under pressure as liquids in metal containers and are often treated, as a safety measure, by the addition of small quantities of highly odiferous substances to indicate leaks. They include, in particular, the following gases, whether or not liquefied: (1) Methane and propane, whether or not pure * * *" [Emphasis in original.] We interpret this language of the EN to the effect that propane is a gas.

Accordingly, we find that the propane heaters are appliances for gas fuel.

This determination is consistent with the following rulings: HQ 950297 dated December 31, 1991, where Customs classified a catalytic safety heater which uses liquid propane gas in subheading 7321.81.50, HTSUS; and NY 838467 dated March 28, 1989, where Customs classified a table top gas grill fueled by low pressure liquefied petroleum gas in subheading 7321.11.10, HTSUS.

We are unable to determine from the available information if the liquid propane heaters are portable. We find that they are portable if they are not intended to be permanently affixed to the floor or wall when in use. They are not portable if they are permanently affixed. See *United Import Sales, Inc. v. United States*, 66 Cust. Ct. 355 (1971).

Therefore, the liquid propane heaters are classified in subheading 7321.81.10, HTSUS, if they are not permanently affixed. They are classified in subheading 7321.81.50, HTSUS, if they are permanently affixed.

Holdings:

The natural gas heaters are classified in subheading 7321.81.50, HTSUS, as: "Stoves, ranges, grates, cookers * * * and similar nonelectric domestic appliances, and parts thereof, of iron or steel: * * * Other appliances: For gas fuel or for both gas and other fuels: * * * Other."

If the propane heaters are not permanently affixed to the floor or wall, they are classified in subheading 7321.81.10, HTSUS, as: "Stoves, ranges, grates, cookers * * * and similar nonelectric domestic appliances, and parts thereof, of iron or steel: * * * Other appliances: For gas fuel or for both gas and other fuels: Portable." If they are permanently affixed, they are classified in subheading 7321.81.50, HTSUS, as: "Stoves, ranges, grates, cookers * * * and similar nonelectric domestic appliances, and parts thereof, of iron or steel: * * * Other appliances: For gas fuel or for both gas and other fuels: * * * Other."

Effect on Other Rulings:

NY 803374 is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A GLASS PLATE ON A SNOWMAN FIGURINE BASE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a ruling letter and treatment relating to tariff classification of a glass plate on a snowman figurine base

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke one ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of a glass plate on a snowman figurine base. Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before February 22, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch, (202) 927–1638.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends revoke one ruling letter pertaining to the tariff classification of glass plate on a snowman figurine base. Although in this notice Customs is specifically referring to one ruling (NY G89939), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the im-

porter or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY G89939, dated April 13, 2001 (Attachment A), a "Snowman Table Server" which is comprised of a clear glass plate on top of a decorated snowman figurine base was classified as a set put up for retail sale having the essential character of a decorative glass plate, and classified in subheading 7013.99.50, HTSUS, as: "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018), other glassware, other * * *: * * * valued over $0.30 but not over $3.00 each." Rather, the merchandise is a composite good comprised in part of agglomerated stone with plastic resin, classifiable under heading 6810, HTSUS, and in part of glass with worked edges, classifiable under heading 7006, HTSUS. Because the size, as well as the decorative and commercial appeal of the snowman component exceeds the utilitarian value of the glass component, the essential character is represented by the agglomerated stone snowman. It is now Customs position that the glass plate on a snowman figurine base is classified in subheading 6810.99.00, HTSUS, as: "Articles of cement, or concrete or of artificial stone, whether or not reinforced: other articles: other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke the ruling cited above and any other ruling not specifically identified in order to reflect the proper classification of the glass plate on a snowman figurine base pursuant to the analysis set forth in proposed HQ 965125 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: January 9, 2002.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 13, 2001.

CLA-2-70:RR:NC:2:226 G89939
Category: Classification
Tariff No. 7013.99.5000

MS. JEANETTE CLERY
ABC DISTRIBUTING, INC.
P.O. Box 611210
North Miami, FL 33261-1210

Re: The tariff classification of a decorative glass article from China.

DEAR MS. CLERY:

In your letter dated March 30, 2001, you requested a tariff classification ruling regarding a "Snowman Table Server".

The subject article is a ten-inch diameter glass plate on a nine and one-half inch tall "polyresin" snowman figurine base. The sample you submitted only included the snowman and not the glass plate. Your sample will be returned to you as requested.

The essential character of this item is represented by the large decorative glass plate. The product is a general-purpose decorative article that can be used to hold numerous household items.

You indicated in your letter that the unit value of the glass plate will be $0.40.

The applicable subheading for the decorative glass article on a snowman base will be 7013.99.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes * * *: other glassware: other: other: valued over $0.30 but not over $3.00 each. The rate of duty will be 30 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Jacob Bunin at 212-637-7074.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC: 965125 DBS
Category: Classification
Tariff No. 6810.99.00

MR. ROLANDO E. PORTAL
ABC DISTRIBUTING, INC.
6301 East 10th Avenue
Hialeah, FL 33013

Re: NY G89939 revoked; glass plate on a snowman figurine base.

DEAR MR. PORTAL:

This is in reference to your letter of June 19, 2001, requesting reconsideration of NY Ruling Letter G89939. In G89939, issued to you April 13, 2001, the Director, National Commodity Specialist Division, New York, classified a "Snowman Table Server" from China in subheading 7013.99.50, Harmonized Tariff Schedule of the United States (HTSUS), which provides for decorative glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes. We have reconsidered the classification of this article and now believe NY G89939 is incorrect.

Facts:

A color advertisement of the article and a sample were submitted. The subject article is comprised of a glass slab with worked edges, measuring approximately 25.0 cm in diameter, sitting atop an agglomerated stone figurine of a snowman with a bird on its shoulder. The Customs laboratory determined that the figurine was composed of approximately 43% plastic resin and 57% calcium carbonate (Lab Report # NO20011393). A submission by the importer confirmed that the calcium carbonate was derived from real stone. The figurine base measures approximately 24.0 cm high and 18.0 cm at its widest. The head of the bird and the raised arm of the snowman are slightly flattened and protective pads are placed on them to accommodate the glass piece.

The New York Customs office determined that the subject article was a set put up for retail sale, and as such was classified under subheading 7013.99.50, HTSUS, providing for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes, other than that of heading 7010 or 7018, valued between $0.30 and $3. You contend that the subject article is a composite good and should be classified under subheading 7013.99.80, HTSUS, providing for glassware valued between $3 and $5. The essential character of the article was not challenged.

Issue:

What is the proper classification of the Snowman Table Server?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note. In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

6810	Articles of cement, or concrete or of artificial stone, whether or not reinforced:	
	Other articles:	
6810.99.00		Other

*	*	*
7006.00		Glass of heading 7003, 7004, 7005, bent, edge-worked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials:
		Other:
7006.00.40		Other
*	*	*
7013		Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018):
		Other glassware:
7013.99		Other:
		Other:
		Other
7013.99.50		Valued over $0.30 but not over $3 each
*	*	*
		Valued over $3 each:
		Cut or engraved:
7013.99.60		Valued over $3 but not over $5 each

In NY G89939, dated April 13, 2001, the Director, National Commodity Specialist Division, New York, classified the snowman table server according to the standards used to classify glass articles on metal stands. We have reconsidered that ruling and now believe that applying those standards to the subject snowman table server was misplaced. Glass articles with metal stands are not analogous to the subject good. With glass articles with metal stands, the glass is usually the larger component, has greater consumer appeal and is more important to the function of the article. *See* Informed Compliance Publication on *Decorative Glassware*, issued August, 2001; *see also Lamps, Lighting and Candle Holders*, issued March 1998 and *New Decisions on Candle Holders v. Decorative Glass Articles*, issued February, 2000. With respect specifically to table/kitchen glassware with metal racks, stands or bases, articles are classified by the glass component because the glass makes up the body of the article. *See* Informed Compliance Publication on *Table and Kitchen Glassware*, issued March, 2000. None of these is true of the snowman table server.

Here, the snowman base exceeds the glass component in size, weight and bulk. The snowman base provides the consumer appeal; the item is in fact advertised to "add wintry charm." The decorative nature of the merchandise outweighs the utilitarian value provided by the glass because the primary purpose of purchasing such an item is for decoration. As such, the snowman makes up the body of the article. Accordingly, the glass component is not classifiable as being of a kind of glassware of heading 7013, HTSUS, as originally classified. Rather, it is worked glass of a kind classifiable in heading 7006, HTSUS.

EN 70.06 states, in pertinent part, that the heading includes: "Glass with worked edges (ground, polished, rounded, notched, chamfered, beveled, profiled, etc.), thus acquiring the character of articles such as slabs for table tops. * * *" Chapter Note 3 to Chapter 70 states that "The products referred to in heading 7006 remain classified in that heading whether or not they have the character of articles. The glass component of the subject item is a flat slab of glass, round in shape, with ground and slightly rounded edges. Imported with the base, it has the character of a small table-top. Thus, the glass component is clearly an article of heading 7006, HTSUS.

Further, it is noted that the EN also states that glass plates for articles of furniture are classified with the articles of furniture if imported at the same time, whether or not assembled, and are intended for incorporation therein. However, the subject article as a whole is not furniture. The ENs to Chapter 94, the chapter for furniture, define "furniture" to mean "any 'movable' articles * * * which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose * * *." This table server was not designed to be placed on the floor or ground, but rather on a raised surface (i.e., a table, counter, etc.). Nor is its purpose mainly utilitarian. The main purpose of the snowman table server is decorative, its utility is secondary. Therefore, the glass, though having the character of a table-top, is not furniture.

The snowman component is made of calcium carbonate, derived from stone, and reinforced with plastic resin. This material, known as agglomerated stone or artificial stone, is provided for in heading 6810, HTSUS. EN 68.10 states that the heading includes, *inter alia*, goods such as statues, statuettes and animal figurines, and ornamental goods. The

snowman component is an article of heading 6810, HTSUS, which provides for articles of cement, concrete and artificial stone, whether or not reinforced.

The good is described in part only by heading 6810 and 7006, HTSUS. Thus it is properly classified according to GRI 3(b). EN (IX) to GRI 3(b) states that, "composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts." We are satisfied that the snowman table server satisfies the requirements of a composite good that is in part agglomerated stone of heading 6810, HTSUS, and in part a piece of glass with worked edges of heading 7006, HTSUS. Although not attached to the glass, the snowman base would not normally be offered for sale separately, as its arm is raised to hold up the glass slab, and protective pads secure the glass to the snowman base. Similarly, the glass slab is cut to size to complement the snowman base.

As the item is a composite good, we must now determine which component imparts the essential character. EN VIII to GRI 3(b) explains that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods."

As discussed above, the bulk, weight and decorative nature of the snowman base exceeds the utility provided by the glass component. The snowman base provides the article with its essential character. Accordingly, the snowman table server is classifiable under heading 6810, HTSUS, as other articles of artificial stone, whether or not reinforced.

Holding:

The Snowman Table Server is classified in subheading 6810.99.00, HTSUS, which provides for, "articles of cement, of concrete or of artificial stone, whether or not reinforced: other articles: other."

Effect on Other Rulings:

NY G89939 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Herbert N. Maletz*
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

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* Died January 6, 2002.

[PUBLIC VERSION]

(Slip Op. 01–148)

PRECISION SPECIALTY METALS, INC., PLAINTIFF *v.*
UNITED STATES OF AMERICA, DEFENDANT

Court No. 98–02–00291

[Plaintiff's motion for summary judgment GRANTED. Defendant's cross-motion for summary judgment DENIED]

(Decided December 14, 2001)

Collier Shannon Scott, PLLC, Washington, DC *(Mark Austrian, Laurence J. Lasoff, Robin H. Gilbert, John M. Herrmann); Howrey, Simon, Arnold & White*, Washington, DC *(Jeffrey W. Brennan)*, for Plaintiff.

Stuart E. Schiffer, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office; *John J. Mahon*, Commercial Litigation Branch, Civil Division, Department of Justice, New York, New York; *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, New York, New York, of counsel, for Defendant.

OPINION

I

PRELIMINARY STATEMENT

WALLACH, *Judge:* On September 20, 2000, this court in *Precision Specialty Metals, Inc. v. United States*, 116 F. Supp. 2d. 1350 (CIT 2000) *("Precision I")*, denied a motion by Plaintiff Precision Specialty Metals, Inc. ("Precision") for summary judgment, and ordered that the case be set for trial. Familiarity with that decision is presumed. The parties submitted pretrial memoranda during February 2001. After reviewing those memoranda, the court concluded that the issues presented were almost entirely legal, and thus susceptible to resolution or narrowing by motion, rendering trial premature or unnecessary. Transcript of Pretrial Conference dated February 20, 2001 ("Tr.") at 3–4. By order dated February 21, 2001, the court vacated its earlier order for a trial, and di-

rected the parties to submit the case for resolution on motion or motions for summary judgment. This case now comes before the court on Plaintiff's Motion for Summary Judgment Pursuant to United States Court of International Trade Rule 56 ("Plaintiff's Motion for Summary Judgment") and Defendant's Cross-Motion for Summary Judgment ("Defendant's Cross-Motion").

In its Motion for Summary Judgment, Plaintiff Precision contests Customs' denial of drawback on certain entries of stainless steel trim and scrap. Plaintiff argues that the facts stipulated by the parties require a finding that Customs violated 19 U.S.C. § 1625(c)(2), by failing to engage in a notice-and-comment process prior to issuing a ruling which reversed Customs' earlier treatment of 69 similar entries as eligible for drawback. Customs based its denial on a determination that the subject merchandise is "waste" or "valuable waste", and thus is not an "article manufactured or produced" within the meaning of the drawback statute, 19 U.S.C. § 1313(b) (1994). Plaintiff also contends that, as a matter of fact and of law, the merchandise at issue is not waste, and that Plaintiff is entitled to drawback thereon.

In its Cross-Motion, Defendant seeks summary judgment upholding the decision of the Customs Service that the substitution manufacturing drawback claims filed by Precision on entries of stainless steel scrap are not eligible for drawback, and dismissing Precision's action.

For the reasons stated below, the court grants summary judgment in favor of Precision, and denies Defendant's Cross-Motion.

II

BACKGROUND

This case involves 38 claims for substitution manufacturing drawback made pursuant to 19 U.S.C. § 1313(b), and Treasury Decision ("T.D.") 81–74. T.D. 81–74 is a general drawback contract for articles manufactured using steel, and provides, in pertinent part, for the allowance of drawback on imported "[s]teel of one general class, e.g. an ingot", where the "merchandise * * * which will be used in the manufacture of the exported products" is "[s]teel of the same general class, specification and grade as the [subject imported] steel[.]" The steel used in the manufacture of the exported products on which drawback is sought must be "used to manufacture new and different articles, having distinctive names, characters and uses." T.D. 81–74 further provides that "no drawback is payable on any waste which results from the manufacturing operation."

On October 23, 1991, Precision submitted a letter to Customs expressing its intention to adhere to and comply with the terms of T.D. 81–74. *See* Appendix Accompanying the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment March 31, 2000 ("App.") A–1. In that letter, Precision described the various steel products on which it would claim drawback. Those products included "stainless steel coils, sheets and trim" of various chemistries identified by industry standards. *Id.* at 1. Customs granted Precision's request to

claim drawback under T.D. 81–74.[1] App. A–4 (Letter from Customs to Precision, dated January 10, 1991 [sic—1992]).

Precision filed 116 drawback entries under T.D. 81–74 between December 11, 1991 and May 13, 1996. Rule 56(i) Statement, ¶ 5. Customs liquidated 69 of these entries with full benefit of drawback, in which Precision had claimed exports of stainless steel trim, stainless steel strip, stainless steel scrap and stainless steel coils, [resulting in Precision's receipt of a significant sum of duty drawback.] *Id.* at ¶ 6. Over that period, Customs routinely requested clarifying information concerning Precision's drawback entries. *Id.* at ¶ 7. Prior to January 1996, Customs never questioned the eligibility of that merchandise for drawback. *Id.* at ¶ 7.

Documentation submitted in connection with the remaining entries, which contained the merchandise at issue, described the merchandise by various terms such as "stainless steel," "metal scrap," "scrap steel for remelting purposes only," "steel scrap sabot," "stainless steel scrap," and "desperdicio de acero inoxidable."[2] *Id.* at ¶ 18. *See* App. B at 2.

During 1992 and 1993, when conducting "pre-liquidation reviews" of three drawback claims that involved exports of "[s]tainless [s]teel coil ends and side trim (scrap)", Customs asked Precision for additional information and documentation on the exports involved. App. A–8 (Letter from Customs to Pat Revoir dated July 10, 1992); App. A–11 (Letter from Gary Appel to Customs dated July 22, 1992). In response, Precision furnished Customs with additional information and documentation, showing that the exported material was stainless steel scrap. Customs liquidated each of those three drawback entries for the full amount of drawback claimed. *See* App. A–14 (Notice of Liquidation); Rule 56(i) Statement, ¶¶ 8–10.

In January 1996, Customs first questioned the eligibility of Precision's claims involving stainless steel trim for drawback. *See* Rule 56(i) Statement, ¶ 7; App. A–7 (January 10, 1996 notice from Customs to Appel-Revoir). In June 1996, Precision received a Notice of Action informing it that 38 of its drawback entries were being liquidated without the benefit of drawback in full or part, on the basis that "scrap was shown on the export bill(s) of lading" and that "[d]rawback is not available upon exports of valuable waste."[3] App. A–20. The entries at issue were liquidated on June 14, 1996. Rule 56(i) Statement, ¶ 14.

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[1] On July 26, 1993, Precision notified Customs of a change in the terms of its authority to operate under T.D. 81–74 concerning the names of officers of the company who would sign drawback documents on the company's behalf. App. A–5 (Letter from Precision to Customs, dated July 26, 1993). Customs approved this amendment by letter of September 7, 1993 without prejudice to any existing drawback claims on file. App. A–6 (Letter from Customs to Precision, dated September 7, 1993).

[2] Customs translated this term as "stainless steel waste". App. B (Customs HQ Ruling 227373, dated Oct. 10, 1997) at 2. Plaintiff has not submitted any evidence to contradict this translation.

[3] When required to state the "complete factual basis supporting the U.S. Customs Service's determination that entries filed by or on behalf of the Plaintiff claiming drawback on the merchandise at issue are not eligible for drawback", Customs responded that "[t]he merchandise in issue is either waste or valuable waste. Neither waste nor valuable waste are manufactured or produced. Accordingly, the exportation of the merchandise in issue is not eligible for drawback." *See* App. C (Plaintiff's First Set of Interrogatories and First Request for Production of Documents (Interrogatory No. 15) and Defendant's Responses thereto (response to Interrogatory No. 15)).

III

ANALYSIS

A

STANDARD OF REVIEW

The court subjects this motion for summary judgment to the usual standard on summary judgment. "Summary judgment is warranted when, based upon the 'pleadings, depositions, answers to interrogatories, * * * admissions on file, * * * [and] affidavits, if any,' the court concludes that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Peg Bandage, Inc. v. United States*, 17 CIT 1337, 1339 (1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (citing Rule 56(d) Rules of the Court of International Trade (1993)).

On a motion for summary judgment, the movant bears the burden of demonstrating that there is no genuine issue of material fact. *United States v. F. H. Henderson, Inc.*, 10 CIT 758, 760 (1986) (citing *SRI Int'l v. Matsushita Elec. Corp. of America*, 775 F.2d 1107, 1116 (Fed. Cir. 1985)). If that burden is not met, there can be no grant of summary judgment.

In reviewing this motion, the court reviews Customs' denial of Plaintiff's protest *de novo*. *See Rheem Metalurgica S/A v. United States*, 20 CIT 1450, 1456, 951 F. Supp. 241, 246 (1996), *aff'd* 160 F.3d 1357 (Fed. Cir. 1998). Although the decision of the Customs Service is presumed correct and "[t]he burden of proving otherwise shall rest upon the party challenging such decision," the court's role in reviewing the decision is to reach the correct result. 28 U.S.C. § 2639(a)(1) (1994); *see also Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

If the governing statute is clear on its face, the court must follow Congressional intent, regardless of the existence of an interpretation by Customs to the contrary. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). "[T]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead*, 121 S.Ct. 2164, 2171 (2001) (footnotes omitted);[4] *see also Chevron*, 467 U.S. at 842–43. Agency interpretations which lack the force of law are "entitled to respect * * * but only to the extent that those interpretations have the 'power to persuade'." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Mead*, 121 S.Ct. at 2168.

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[4] Where a statute is ambiguous or silent on a specific issue, and it is *apparent* from the agency's generally conferred authority and other statutory circumstances that Congress expects the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, a reviewing court "is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Mead*, 121 S.Ct. at 2172 The necessary corollary to this principle is that, where it is *not* apparent that Congress expects the agency to be able to speak with the force of law, the agency's position is not entitled to deference.

B

CUSTOMS' DENIAL OF PLAINTIFF'S PROTEST DID NOT CONFORM TO THE REQUIREMENTS OF 19 U.S.C. § 1625(c)

In *Precision I,* the court considered Plaintiff's argument that Customs' determination that Precision's stainless steel scrap is not eligible for drawback can only be applied prospectively, under 19 U.S.C. § 1625(c)(2) (1994).[5] The court held that, to prevail on its § 1625(c)(2) claim, Plaintiff was required to show that Customs' October 10, 1997 denial of Precision's protest was a ruling, and that it changed a "treatment" previously accorded by Customs to substantially identical transactions, and that Customs failed to follow the notice-and-comment procedure outlined in § 1625(c)(2). *Precision I*, 116 F. Supp. 2d. at 1377. Based on these criteria, the court concluded in *Precision I* that Plaintiff had not presented the court with sufficient record evidence to conclude that all five elements of § 1625 are satisfied. *Id.* at 1377–78. The court found that the payment of drawback on 69 previous entries of stainless steel scrap was a "treatment" under § 1625(c) (contingent on a showing by Plaintiff that more than one of these entries was "substantially identical" to the merchandise at issue), because those prior entries constituted more than a single transaction. *Id.* at 1377. The court determined, however, that Plaintiff had failed to provide the court with evidence documenting its claim that Customs approved drawback on substantially identical transactions.[6] *Id.* at 1377–78. The court also found that Plaintiff had failed to present the court with any evidence to indicate whether or not Customs followed the notice-and-comment procedure prior to the issuing the October 10 decision. *Id.* at 1378. The court concluded that the absence of record evidence on these points barred summary judgment in Plaintiff's favor in *Precision I. Id.*

Plaintiff now claims that the facts stipulated by the parties since the issuance of *Precision I* establish that Customs approved drawback on substantially identical transactions, and that Customs failed to follow the notice-and-comment procedure prior to issuing its October 10th de-

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[5] This statute provides as follows:

§ 1625 Interpretive rulings and decisions; public information

(a) Publication.

Within 90 days after the date of issuance of any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision under this Act with respect to any customs transaction, the Secretary shall have such ruling or decision published in the Customs Bulletin or shall otherwise make such ruling or decision available for public inspection.

* * * * * * *

(c) Modification and revocation.

A proposed interpretive ruling or decision which would—

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions; shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

19 U.S.C. § 1625 (Emphasis supplied indicates portions on which Plaintiff relies).

[6] Specifically, the court sought a detailed description of the merchandise on which drawback was denied, together with information regarding the dates, ports, and exact nature of each of the earlier transactions. *Precision I*, 116 F. Supp. 2d. at 1378.

cision. Plaintiff contends that these stipulations remove any issue of disputed fact, and entitle it to summary judgment as a matter of law. Specifically, the parties stipulated that "[t]he transactions described in the export bills of lading for the 69 drawback entries liquidated by Customs between October 15, 1993 and July 7, 1995 with the benefit of drawback were substantially identical to the transactions described in the export bills of lading for the 38 entries for [sic] which Customs liquidated without the benefit of drawback and which are at issue in this litigation." Annex Pursuant to USCIT R. 56(h): Plaintiff's Statement of Material Facts Not in Dispute ("Plaintiff's 56(h) Statement"), ¶ 71. The parties also stipulated that, prior to issuing the October 10th decision, "Customs did not publish this ruling in the *Customs Bulletin* as a proposed ruling or decision, nor did Customs give interested parties an opportunity to submit—during a period of at least 30 days afterward—comments on the correctness of that ruling. Nor did Customs consider any comments on that ruling, or subsequently publish a final ruling thereafter." Plaintiff's 56(h) Statement, ¶ 78. These facts are sufficient to resolve the factual issues which the court identified in *Precision I* as precluding summary judgment.

1

THE DEFENDANT'S ARGUMENTS REGARDING 19 U.S.C. § 1625(c)(2) ARE COGNIZABLE AT THIS STAGE IN THE LITIGATION

Despite the government's stipulation of these facts, it interposes legal arguments that challenge the court's construction of § 1625(c)(2), as set forth in *Precision I*. These arguments represent, in essence, a request to reargue the issues raised in *Precision I*, in which the court struck the government's briefs.[7]

Although, on its face, USCIT R. 59 provides only for "[a] new trial or rehearing * * * in an action tried without a jury or in an action finally determined," it has been well-recognized that the concept of a new trial under [this Rule] is broad enough to include a rehearing of any matter decided by the Court[.]" *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 584, 623 F. Supp. 1262, 1274 (1985), *rev'd on other grounds*, 840 F.2d 1547 (Fed. Cir. 1988) (quoting *Timken Co. v. United States*, 6 CIT 76, 76, 569 F. Supp. 65, 67 (1983), (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2804 at 35 (1973))). Accordingly, the court will consider Defendant's arguments in light of USCIT R. 59.

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[7] Defendant points to the transcript of the February 20, 2001 pretrial conference, at which the court stated, "Does the fact that [Defendant's opposition to Precision's first summary judgment motion] was stricken prohibit the government from raising those arguments now?" Tr. at 7, "I'm not sure it [*Precision I*] still does [stand]." Tr. at 21. Defendant takes these statements as an invitation for it to relitigate the arguments contained in its stricken brief. Defendant's Memorandum of Law In Support of Its Cross Motion for Summary Judgment at 4. In the pretrial conference, counsel for Precision arguably conceded that it would be appropriate for the court to review the arguments in question: "[I]t would be my view that the Court ought to reach the correct result * * * such that from the practical point of view I am perfectly happy to have this Court take another look at its opinion and see if it changes anything." Tr. at 17–18.

Defendant also argues that it should not be precluded from raising, at this stage of the litigation, the same arguments contained in its stricken brief in *Precision I*. Defendant suggests, without citation to any authority, that the court's earlier decision to impose a sanction does not bar the court from considering arguments which could have been raised at that stage of the litigation but were stricken.

As this court has previously noted, the grant of a motion for reconsideration is within the sound discretion of the court. *Union Camp v. United States*, 963 F. Supp. 1212, 1213 (1997) (citing *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990)). "The purpose of a rehearing is not to relitigate a case," but to rectify a significant flaw in the conduct of the original proceedings. *Kerr-McGee*, 14 CIT at 583 (citations omitted). Although specific grounds upon which a court may grant such a motion are not listed in the Rule, it is well established that the court will not disturb its decision unless it is "manifestly erroneous." *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 337, 601 F. Supp. 212, 214 (1984) (quoting *Quigley & Mannard, Inc. v. United States*, 61 CCPA 65 (1974)).[8] As set forth below, Defendant has failed to demonstrate manifest error in the court's earlier ruling.

2

THERE ARE NO GROUNDS FOR A REMAND TO ALLOW CUSTOMS TO ADDRESS PLAINTIFF'S ARGUMENTS REGARDING 19 U.S.C. § 1625(c)(2)

Defendant argues[9] that remand is necessary, because Precision failed to raise its § 1625 argument before Customs.[10] Specifically, the government argues that Customs should be permitted to determine "if the granting of the 68 [sic] drawback claims involving stainless steel scrap constituted a 'treatment' for purposes of 19 U.S.C. § 1625(c)(2)." Defendant's Memorandum of Law in Support of Its Cross-Motion for Summary Judgment ("Defendant's Mem.") at 26. Defendant does not offer any legal theory or authority to support its remand request, nor does Plaintiff direct the court's attention to any authority supporting its position.

Implicit in Defendant's remand claim is reliance upon the doctrine of primary jurisdiction. The common law doctrine of primary jurisdiction is "designed to guide a court in determining whether and when it should refrain from or postpone the exercise of its own jurisdiction so that an agency may first answer some question presented." *Borlem S.A.—Em-*

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[8] Defendant implicitly asks the court to disregard the law of the case doctrine. "The law of the case doctrine holds that 'a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.'" *Chung Ling Co., Ltd. v. United States*, 17 CIT 829, 836, 829 F. Supp. 1353, 1360 (1993) (citing 1b James W. Moore *et al.*, Moore's Federal Practice ¶¶ 0.404[1] (2d ed.1992)). In other words, it is "the practice of courts generally to 'refuse to reopen what has been decided.'" *Koyo Seiko Co., Ltd. v. United States*, 19 CIT 873, 880, 893 F. Supp. 52, 57 (1995) (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). "Under this doctrine, a court will generally not reopen an issue already decided unless (1) the evidence in a subsequent trial was substantially different, (2) controlling authority has since made a contrary decision of law applicable to such issues, or (3) the decision was clearly erroneous and would work a substantial injustice." *Id.*, 19 CIT at 880, 893 F. Supp. at 57 (citations omitted). Defendant has not presented the court with any of these three factors, nor any other factor, to persuade the court that it should disturb its previous decision. Nevertheless, as Defendant notes, this court is obligated under *Jarvis Clark Co.*, 733 F.2d 873 (Fed. Cir. 1984) to reach the correct decision.

[9] Defendant also argues that the matter should be remanded to Customs to allow it to determine the proper amount of drawback, if any, on the subject entries. Defendant's Mem. at 27 ("Since only a small portion of the imported merchandise resulted in the exported scrap, the amount of duties refundable as drawback for the exported scrap must be properly apportioned.") Plaintiff contests this assertion, noting that "[b]ecause Precision's drawback claims involving stainless steel scrap were filed on the basis of the amount of stainless steel 'appearing in' the exported scrap, there is no need or rationale for remanding the claims to Customs for a determination of whether Precision's claims apportioned drawback between stainless steel sheet and strip and stainless steel scrap." Plaintiff's Response in Opposition to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Its Motion for Summary Judgment at 5. Precision correctly notes, however, that Defendant has failed to include a request for remand in its motion, although its briefs devote several pages to the issue.

[10] Precision does not dispute that it did not raise this argument before Customs. Defendant also argues that Precision failed to identify § 1625 in its summons or complaint as the basis of a claim, thus depriving Defendant of fair notice of the claim. Defendant argues, without citation, that the court should thus decline to consider the § 1625 claim. To the extent that Defendant seeks to dismiss this claim, the court declines to do so.

preedimentos Industriais v. United States, 13 CIT 231, 234, 710 F. Supp. 797, 800 (1989). The purpose of the doctrine is "to give effect to legislative intent underlying the established regulatory scheme by referring matters involving agency expertise back to the agency so that it may, in the first instance, pass upon the issue from its unique administrative perspective." *Id.* The central concern is the "promotion of uniformity in agency decisions and respect for the deference due the 'expert and specialized knowledge of the agencies.'" *Id.* (citing *United States v. W. Pac. R.R. Co.,* 352 U.S. 59, 64 (1956)). The "'doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.'" *Id.,* 13 CIT at 235, 710 F. Supp. at 800 (quoting *United States v. Philadelphia Nat. Bank,* 374 U.S. 321, 353 (1963)).

Two factors generally guide application of the doctrine: "'[I]n cases raising *issues of fact* not within the conventional experience of judges or cases requiring the exercise of *administrative discretion,* agencies created by Congress for regulating the subject matter should not be passed over.'" *Western Pacific,* 352 U.S. at 64 (emphasis added) (quoting *Far East Conference v. United States,* 342 U.S. 570, 574 –75 (1952)). "[W]here the question is simply one of construction the courts may pass on it as an issue 'solely of law.' But where words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so that 'the enquiry is essentially one of fact and of discretion in technical matters,' then the issue of tariff application must first go to the [agency]." *Id.* (quoting *Great N. Ry. Co. v. Merch. Elevator Co.,* 259 U.S. 285, 291 (1922)); *see also Borlem,* 13 CIT at 237, 710 F. Supp. at 802 (it is "inappropriate to invoke the doctrine of primary jurisdiction [where] the question before [the] Court [is] entirely one of statutory interpretation."). Here, the facts relating to Plaintiff's "treatment" claim have all been stipulated. The question presented is one of pure statutory interpretation, and the relevant statute does not involve the tariff provisions. The doctrine of primary jurisdiction does not support remand in this case.

3

19 U.S.C. § 1625(c)(2) GOVERNS THE FACTS OF THIS CASE

Defendant next argues that § 1625(c)(2) is not applicable to these facts, arguing that the court erred in its earlier construction of the term "treatment." After careful consideration, the court is unpersuaded by Defendant's argument.

II

THE ACTIONS OF CUSTOMS' OFFICERS GIVE RISE TO A "TREATMENT", WITHOUT A SHOWING OF KNOWLEDGE OR INTENT

Defendant contends that "in order to qualify as [a] 'treatment previously accorded to substantially similar transactions,' Customs must have customarily acted in a particular manner which [sic] respect to prior transactions to which it either agreed or determined to be suitable

and proper." Defendant's Mem. at 28. Defendant bases its argument on the use of the word "accord" in 19 U.S.C. § 1625(c)(2), which requires the use of the notice and comment procedure where a "proposed interpretive ruling or decision * * * would * * * have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions." Defendant cites the following definition of the term "accord": "1: to bring into agreement: RECONCILE 2a: to grant as suitable or proper b: to allow as concession * * *." *Webster's New Collegiate Dictionary* (1977). *See* Defendant's Mem. At 28. "Accord" is elsewhere defined as:

> **1:** to bring into agreement: RECONCILE, HARMONIZE <the scientists' conclusions seem contradictory but can be ~*ed* by calm reasoning> **2a:** to grant as suitable or proper: to render as due <parents have rights which are not ~*ed* to strangers or neighbors – A.I. Melden> <formerly, historians ~*ed* to "justice" less than its due place – J.G. Edwards> **b:** ALLOW, CONCEDE <the law ~*s* them favored status> <he decided to ~ himself the delight of breaking the news – P.B. Kyne> **c:** AWARD <the President ~*ed* him an honorary title> **d:** ALLOT <in spite of the injustices ~*ed* him> * * *.

Webster's Third New International Dictionary at 12 (1986). Defendant thus argues that, to constitute a treatment under § 1625(c)(2), Customs must have determined the predecessor transactions to be "suitable or proper". Defendant's Mem. at 28–29. Expanding on this theory, Defendant argues that Precision must establish, in addition to the elements identified by the court in *Precision I,* that Customs "knowingly" granted Precision's claims for drawback on the 69 entries, in order to prevail on its "treatment" theory. Defendant's Reply to Plaintiff's Response in Opposition to Defendant's Cross-Motion For Summary Judgment and Reply in Support of Its Motion for Summary Judgment ("Defendant's Reply Mem.") at 5. The question then arises as to *who* at Customs must deem the subject transactions "suitable or proper," or "knowingly" grant drawback.

On this issue, Defendant cites 19 C.F.R. § 191.10(a), arguing that there can be no "treatment" where Customs has not performed the verification authorized under this regulation. Notably absent from Defendant's brief is any quotation of the text of this regulation, a reading of which compels the rejection of Defendant's claim. Although subject to slight variants during the years 1991 through 1996, during which Customs granted drawback on the 69 entries claimed to constitute the predicate "treatment," the following iteration is typical in all material respects:

> **§ 191.10 Verification of drawback claims.**
>
> (a) *Claims.* A drawback claim filed under a drawback contract shall be **subject to** verification by the regional Regulatory Audit Division under the jurisdiction of the regional commissioner in

> whose region the claim is filed when the factory covered by the claim also is located in the same region.

19 C.F.R. § 191.10(a) (1992) (emphasis added). The emphasized term, "subject to", indicates that, while any drawback claim **may** be verified, such verification is not performed for every claim. This reading is reinforced by the following subsection, which states that "[i]f the claim **selected for verification** is filed in one region and one or more factories covered by the claim is located in another region, the regional commissioner **selecting the claim** for verification * * * may forward copies of the claim and the drawback contract, and request for verfication to the regional commissioners in whose regions the other factories are located." 19 C.F.R. § 191.10(b) (1992) (emphasis added). Claims are **selected** for verification; verification is not a necessary or inherent part of the drawback process. As with Precision's entries, drawback may be granted on entries made over a period of years, and never be subjected to any verification whatsoever.[11] This fact precludes the adoption of Defendant's argument. If the court were to hold that verification is an essential prerequisite for the creation of a "treatment" under § 1625(c)(2), the provisions of that section would be eviscerated; where there is no assurance that the entries are subject to verification, there is no assurance of "treatment."

The government also argues that Customs "never articulated a position that stainless steel scrap was eligible for drawback which could constitute a 'treatment' within the intended meaning of § 1625(c)(2)." Defendant's Mem. at 32 (citations omitted). This argument equates "position" with "treatment", a link that must be rejected, based on the face of § 1625(c)(2) and on its legislative history. As this court noted in *Precision I*, "the use of the word 'treatment', rather than 'position', represents a Congressional departure from the language of the apparent source text of [19 CFR] § 177.10. The court can only assume that this change was made in an effort to move away from the strict judicially-created definition of the term 'position'", *Precision I*, 116 F. Supp. 2d at 1377, particularly as the requirements of § 1625 "already appeared, in more detailed and discretionary form," *id.* at 1374, in § 177.10, and since "Congress * * * is presumed to know the existing law pertinent to legislation it enacts," *id.* at 1375.

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[11] The government claims that the "preliquidation review" performed by Customs' agents was "cursory in nature and did not cover any interpretive aspect of drawback eligibility pursuant to either the statute or customs regulations." Defendant's Mem. at 30. Customs, however, was presented with numerous opportunities to review Precision's claim for drawback on scrap, starting with Precision's submission of its initial intention to adhere letter, which referenced "trim", another term for scrap. The first of the 69 drawback claims granted by Customs specifically stated that the exported goods included "scrap". *See, e.g.*, Plaintiff's Exs. 44, 44a, 45, 45a, 46, 46a, 47, 47a, 55, 55a, 57, 57a, 73 and 73a (drawback entry forms and liquidation notices thereon). Customs granted drawback on this, and 68 other entries similarly denominated. Indeed, there is nothing in the provisions of 19 C.F.R. § 191.10(a) which requires any greater scrutiny by Customs than that given by those officials who granted Precision's 69 claims.

Similarly, Customs' claims that "the nature of the merchandise which Precision manufactured and exported was far from clear," Defendant's Mem. at 30, is irrelevant under the "treatment" provisions. Even if it were relevant, the Court finds those claims disingenuous, in light of the consistent trail of correspondence and submissions in which Precision and its agents describe the entries on which drawback was granted as "scrap". *See, e.g.*, Plaintiff's Exs. 1a (letter dated July 22, 1992 from G. Appel to V. Golloday of Customs), 1j, 1k, 1l (including copies of "scrap tickets"), 71, 71a (letter dated Oct. 1, 1993 from G. Appel to R. Ficek of Customs).

Precision argues that Customs' reading would "completely eliminate the statute's clear bifurcation of Customs' treatment of 'substantially identical transactions' under § 1625(c)(2), in contrast to the consideration of Customs' 'policies' or 'positions' under § 1625(c)(1)." Plaintiff's Reply Mem. at 9. The government replies, correctly, that "the terms 'policy' and position' do not appear in either subsections (c)(1) or (c)(2)," and argues (without citation) that "[a]ll of § 1625 relates to Customs policies and positions," contending that "(c)(1) relates to Customs policies and positions as revealed in written form, *i.e.*, 'prior interpretive ruling or decision,' while subsection (c)(2) covers the situation where Customs policy was not written up but was manifested in Customs Service action." Defendant's Reply Mem. at 6. The government attempts to buttress its argument, arguing that the court erred in finding that the use of the term "treatment" constituted a departure from the use of the term "position" in the apparent source text of 19 CFR § 177.10. Rather, contends the government, the statutory language "treatment previously accorded by the Customs Service to substantially identical transactions" "was likely adopted from 19 CFR § 177.9, not § 177.10." Defendant's Reply Mem. at 6.

19 C.F.R. § 177.9, the subsection which uses the cited language, makes no mention of "positions," "policies" or "practices." This section (Customs' own regulation) is the apparent source text from which the term "treatment" was grafted onto § 177.10. A review of this section further reinforces the distinction drawn between the terms "treatment" and "position" in *Precision I*. 19 C.F.R. § 177.9 describes in detail the types of proof needed to establish a "treatment" under the regulatory scheme which Congress adopted in § 1625(c)(2):

> In applying to the Customs Service for a delay in the effective date of a ruling letter [which has the effect of modifying a treatment previously accorded by Customs to substantially identical transactions], an affected party must demonstrate * * * that the treatment previously accorded by Customs to the substantially identical transactions was sufficiently consistent and continuous that such party reasonably relied thereon in arranging for future transactions. The evidence of past treatment by the Customs Service shall cover the 2-year period immediately prior to the date of the ruling letter, listing all substantially identical transactions by entry number (or other Customs assigned number), the quantity and value of merchandise covered by each such transaction (where applicable), the ports of entry, and the dates of final action by the Customs Service. The evidence of reliance shall include contracts, purchase orders, or other materials tending to establish that the future transactions were arranged based on the treatment previously accorded by the Customs Service.

19 C.F.R. § 177.9(e)(2) (2000). The only proof needed to establish a treatment is a description of the transactions; the only intent referenced by the regulation is that of the **importer,** in arranging its affairs in reliance on the treatment.

This reading is further reinforced by a review of the notice proposing the amendments that added the relevant language to § 177.9. Defendant argues that this reflects Congress' intent in later enacting 19 U.S.C. § 1625(c)(2), and that this notice demonstrates that there was no "intent to broaden the scope of § 1625(c)(2) to actions that did not reflect the policies and positions of the Customs Service even though they had not been expressed in written rulings or decisions." Defendant's Reply Mem. at 7. While Customs' notice may or may not be probative of Congress' intent, the notice directly contradicts the government's assertion. It reads, in pertinent part, as follows:

> Uniformity of Customs Officers' Decisions
>
> Section 7361(c) of the Anti-Drug Abuse Amendments Act of 1988 (Title VI, Pub. L. 100–690) requires the Secretary of the Treasury to promulgate **regulations to provide for nationwide uniformity of certain decisions made by U.S. Customs Service officers** and to establish procedures by which certain parties affected by the lack of such uniformity may have the alleged inconsistencies resolved.
>
> **The number of Customs Service personnel charged with decision-making responsibilities affecting the importation of merchandise at the various ports of entry in the United States is substantial.** Notwithstanding the existence of a variety of programs and procedures designed to foster uniformity in the decisions it makes, Customs recognizes that inconsistent decisions occur and will inevitably continue to occur.
>
> * * * * * * *
>
> **Although nationwide inspection/examination guidelines are issued** from time to time, **the effective enforcement** by the Customs Service of the tariff and other laws it is charged with enforcing **requires that these guidelines be applied with local discretion** and be augmented by random examinations in order that no importation ever be assured beforehand that it will be exempt from physical examination. Nevertheless, the Customs Service realizes that the decision to examine merchandise at one port while entry of identical merchandise is permitted at another port without examination may be perceived as an inconsistency.
>
> The **Customs Service recognizes that even the small number of real or apparent inconsistencies that occur may pose immediate and grave consequences to the parties directly involved, as well as to the businesses and enterprises whose livelihood depends on the utilization of the particular import facilities and services at the port where the inconsistencies are alleged to exist.** Moreover, insofar as the assessment of Customs duties is concerned, uniformity is mandated by Article 1, Section 8 of the Constitution of the United States. The Customs Service therefore proposes to establish a procedure whereby alleged inconsistencies in decisionmaking may be brought directly to the attention of Customs Headquarters by affected parties for expedited resolution.
>
> * * * * * * *

> The petitioning party will be required to furnish information sufficient to document that apparent inconsistencies exist. In the case of entries of merchandise alleged to have been treated inconsistently, the competing entries must be identified as to port of entry, date, and entry number and the merchandise must be fully described (including brand names, when present and samples, if possible) * * *. In the case of other alleged inconsistencies, the competing entries or other transactions or events must be described in sufficient detail that the Customs Service may quickly verify with the Customs field officials involved that the facts are as alleged.
>
> * * * * * * *
>
> The **Customs Service also proposes to add a new paragraph, (e) to §§ 177.9,** Customs Regulations (19 CFR 177.9(e)), to provide for a similar delay **in the event the Customs Service issues a ruling which, although the matter is not covered by an earlier ruling, modifies the treatment previously accorded to substantially identical transactions by the Customs Service.** Affected parties must request that such a delay be granted and must include with that request information identifying the past transactions claimed to have been relied on as well as evidence of that reliance. As with the requests for a delayed effective date made under proposed §§ 177.9(d)(3), Customs Regulations (19 CFR 177.9(d)(3)), the Customs Service will respond to all such requests individually or by a general notice published in the Customs Bulletin.

Proposed Rules: Certain Administrative Procedures, 54 Fed. Reg. 8208, 8209–10 (Feb. 27, 1989) (emphasis added). The last quoted paragraph belies Defendant's assertion. Subsection 177.9(e) is designed to provide rights to importers aggrieved by a new ruling where "the matter is not covered by an earlier ruling" and the new ruling "modifies the treatment previously accorded substantially similar transactions." This notice recognizes the fact that individual Customs officers may formulate disparate "treatments". As noted in *Precision I,* this term is distinct from the officially formulated "ruling", "position" or "policy".

The government has failed to point to anything in the language or the legislative history of, or the regulatory scheme surrounding, § 1625(c)(2) which persuades the court that its earlier holding—that "[t]he term 'treatment' looks to the *actions* of Customs, rather than its 'position' or policy"—is erroneous. *Precision I,* 116 F. Supp. 2d at 1377 (emphasis in original). Accordingly, the court finds no legal basis for a review of Customs' factual arguments that "the nature of the merchandise which Precision manufactured and exported was far from clear." Defendant's Mem. at 30.

This reading of § 1625(c)(2) is consistent with, and furthers, the legislative history underlying the Customs Modernization Act, which was passed as part of the North American Free Trade Agreement Act, Pub. L. 103–182 § 623 (1993), and substantially amended 19 U.S.C. § 1625:

> The guiding principle in our discussions with the trade community is that of "shared responsibility". Customs must do a better job of

> informing the trade community of how Customs does business; and the trade community must do a better job to assure compliance with U.S. trade rules.
>
> * * * * * * *
>
> As a general statement, Customs supports the JIG concept of "informed compliance." Importers have the right to be informed about Customs rules and regulations, and its interpretive rulings and directives, and to expect certainty that the ground rules would not be unilaterally changed by Customs without the proper notice and an opportunity to respond.

Customs Modernization and Informed Compliance Act: Hearing on H.R. 3935 Before the House Comm. on Ways and Means, Subcomm. on Trade, 102d Cong. 91 (1992) (statement of Commissioner Carol Hallett, United States Customs Service). *See also* S. Rep. No. 103–189 at 64 (1993) ("Title VI also implements the concept of 'informed compliance,' which is premised on the belief that importers have a right to be informed about customs rules and regulations, as well as interpretive rulings, and to expect certainty that the Customs Service will not unilaterally change the rules without providing importers proper notice and opportunity for comment."). The government has failed to point to any contravening legislative history or other authority.

b

PRECISION COMPLIED WITH THE CONDITIONS FOR DRAWBACK

Defendant then argues that a finding that the 69 earlier entries constituted a "treatment", which requires a notice and comment process to change, "would impermissibly reward plaintiff's failure to comply with the statute, regulations and contract." Defendant's Mem. at 32, (citing *Guess?, Inc. v. United States*, 944 F.2d 855, 858 (1991) (Drawback involves an exemption from duty, and is thus "a statutory privilege due only when enumerated conditions are met."); 19 U.S.C. § 1313(l) ("Allowance of the privileges provided for in this section shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe * * *.")). Defendant claims that Precision failed to comply with the terms of the drawback statute because, according to Defendant,[12] Precision claimed drawback on waste, rather than articles that had been manufactured or produced. Defendant's Mem. at 34.

The court must reject this argument. Defendant asks the court to hold Precision to a standard that Customs itself did not follow, insofar as Customs accepted Precision's initial letter of intent to adhere, and approved 69 entries thereafter. Defendant has pointed to nothing in the regulations or Customs laws that Precision has contravened. In short, the eligibility of stainless steel scrap for drawback was a gray area. If the court finds the provisions of § 1625(c) inapplicable where Customs changes its

[12] Defendant claims that the court concluded in *Precision I* that Precision's scrap is not a manufactured or produced article under 19 U.S.C. § 1313(b). The court made no such finding in *Precision I*. Rather, it found that Precision had not met its burden on summary judgment, leaving the court with insufficient evidence to issue a finding as to whether or not scrap is waste. *Precision I*, 116 F. Supp. 2d. at 1371. Notably absent from *Precision I* is any finding that scrap is waste or valuable waste.

treatment in a gray area of the drawback law, then § 1625(c) will have no applicability in any situation. The court leaves for another day the question of whether § 1625(c) is vitiated when the alleged "treatment" by Customs is the approval of drawback against the explicit regulatory or statutory denial of drawback on the goods at issue.

c

§ 1625 Is Not Equitable Estoppel

Defendant cites the long-established tenet that "a party cannot claim estoppel against the Government based upon the actions of an agency employee." *Id.* at 32. Defendant, however, abbreviates the oft-cited rule, which applies to **equitable** estoppel. "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases * * *. [T]he party claiming the estoppel must have relied on its adversary's conduct in such a manner as to change his position for the worse." *Heckler v. Comm. Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 58 (1984). Precision's claims rest not in equity but in the law, through which Congress has selectively and explicitly waived assertion of any rights it might otherwise have in this regard.

In any event, application of the rule set forth in § 1625(c)(2) does not estop the government; it merely requires the government to comply with a statutorily mandated notice-and-comment process before implementing a ruling or decision that changes an earlier treatment. So long as Customs chooses not to follow this process, it is bound by its earlier treatment; Customs may, however, at any time comply with the notice and comment procedure set forth in 19 U.S.C. § 1625, and thus impose a new ruling or decision, consistent with the statute, denying drawback on stainless steel scrap or trim. This process, as Congress and Customs alike evidently intended, provides importers with some predictability in structuring their business, while retaining for Customs flexibility in the exercise of its administrative authority.

In light of this holding, it is unnecessary for the court to reach the issue of whether stainless steel scrap is an article manufactured or produced, under 19 U.S.C. § 1313(b), or waste. Until Customs follows the notice-and-comment procedure set forth in 19 U.S.C. § 1625(c), it is bound by, and all entries in this case are subject to, its earlier treatment of stainless steel scrap as eligible for drawback.

IV

Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is granted. Defendant's Cross-Motion for Summary Judgment is denied.

(Slip Op. 02–01)

ALLEGHENY LUDLUM CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND USINOR, UGINE S.A., AND UGINOX SALES CORP., ET. AL., DEFENDANT-INTERVENORS

Consolidated Court No. 99–09–00566

[Defendant-Intervenors' motion for Judgment Upon an Agency Record granted in part and remanded.]

(Decided January 4, 2002)

Collier Shannon Scott, PLLC, Paul C. Rosenthal, Kathleen W. Cannon, Lynn Duffy Maloney, (John M. Herrmann), for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Thomas B. Fatrouros); Michele D. Lynch*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

Weil, Gotshall & Manges LLP, (Stuart Rosen), Jonathan Bloom, Jennifer J. Rhodes, for Defendant-Intervenors.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

BARZILAY, *Judge:* In this case, the court is asked, yet again, to review the subsidy calculation methodology employed by the Department of Commerce ("Commerce") during countervailing duty investigations and reviews to determine under what circumstances a privatized company is the recipient of a benefit pursuant to United States law. This case comes before the court pursuant to Plaintiffs' and Defendant-Intervenors' USCIT R. 56.2 Motions for Judgment Upon an Agency Record. Plaintiffs and Defendant-Intervenors challenged certain aspects of the final determination of the Department of Commerce International Trade Administration's countervailing duty investigation of stainless steel sheet and strip from France.[1] *See Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from France*, 64 Fed. Reg. 30,774 (1999) *("Final Determination").* While this case was pending before the court, the Federal Circuit issued its opinion in *Delverde SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) *reh'g denied*, Ct. No. 99–1186 (June 20, 2000) *("Delverde III").* On February 29, 2000, Usinor filed, and the court granted, a motion to amend its complaint to add a claim based upon the Federal Circuit's ruling in *Delverde III.* On July 13, 2000, the United States requested a remand to Commerce to consider the impact of the Federal Circuit's holding in *Delverde*

[1] When the case was initiated, Allegheny Ludlum Corp., ("Allegheny") *et al*, the domestic producers, were the Plaintiffs, the United States (Commerce) the Defendant, and Usinor, Ugine S.A. and Uginox Sales Corp. ("Usinor"), the foreign producers, the Defendant-Intervenors. As explained, *infra*, this case was remanded to Commerce before any decision was rendered on Allegheny's motion. After the remand determination, Allegheny supported the outcome of Commerce's redetermination and it was Usinor that objected to certain aspects of the remand results.

III to the facts of this case. The subsequent remand order instructed Commerce to "issue a determination consistent with United States law, interpreted pursuant to all relevant authority, including the decision of the Court of Appeals for the Federal Circuit in *Delverde SrL v. United States* 202 F.3d 1360 (Fed. Cir. 2000)." *Remand Order* (August 15, 2000). The court now reviews Commerce's *Final Results of Redetermination Pursuant to Court Remand: Allegheny-Ludlum Corp., et al v. United States, No. 99–09–00566* (December 20, 2000). *("Remand Determination").*[2] The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994) which provides for judicial review of a final determination by the Department of Commerce in accordance with the provisions of 19 U.S.C. § 1516a(a)(2)(B)(i) (1994).

II. Background

On July 13, 1998, Commerce initiated countervailing duty investigations to determine whether manufacturers, producers or exporters of stainless steel sheet and strip from France, Italy and the Republic of Korea were receiving countervailable subsidies. *See Initiation of Countervailing Duty Investigations: Stainless Steel Sheet and Strip in Coils From France, Italy and the Republic of Korea,* 63 Fed. Reg. 37,539 (July 13, 1998). The period of investigation was calender year 1997. *Id.* Commerce issued its preliminary affirmative determination on November 17, 1998 and its final affirmative determination on June 8, 1999, finding that the total estimated net countervailable subsidy ("CVD") rate was 5.38% *ad valorem* for Usinor and all others. *See Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Stainless Steel Sheet and Strip in Coils from France,* 63 Fed. Reg. 63,876 (Nov. 17, 1998) *("Preliminary Determination"); Final Determination,* 64 Fed. Reg. 30,790. During the investigation, the Government of France ("France" or "French Government") identified a division of Usinor as the sole French producer of the subject merchandise that was exported to the United States during the period of investigation. The French Government was the majority owner of Usinor and Sacilor, another steel producer, until the mid-1980s. *Final Determination,* 64 Fed. Reg. at 30,776. After a capital restructuring in 1986, France was the sole owner of both companies. *Id.* In 1987, France placed Usinor and Sacilor under the ownership of a holding company, with the holding company retaining Usinor as its name. *Remand Determination* at 17. In 1991, Credit Lyonnais, a government-owned bank, purchased 20% of Usinor. *Final Determination,* 64 Fed. Reg. at 30,776. Beginning in the summer of 1995 and continuing through 1996 and 1997, the French Government privatized Usinor through a public stock offering. *Id.* By the end of 1997, approximately 82% of Usinor's shares were owned by

[2] This case is a companion case to *GTS Industries S.A. v. United States,* 26 CIT ___ (2002). GTS Industries, formerly a subsidiary of Usinor, produced and imported products into the United States that were also subject to a countervailing duty investigation. The same privatization transaction is at issue in both cases.

private shareholders, with the remaining shares owned by employees and "stable shareholders."[3] *Remand Determination* at 17.

Despite the public stock offering that privatized Usinor, Commerce concluded in the *Remand Determination* that Usinor was the "same person" after the privatization and, since it had already determined that Usinor had previously received subsidies, it did not have to analyze whether the past subsidies were extinguished by the change in ownership transaction. In making its "same person" finding Commerce used principles of United States law "in the general corporate context." *Remand Determination* at 10. Additionally, Commerce used a 14-year average useful life (AUL) to allocate the benefits bestowed by nonrecurring subsidies.[4] Based upon its findings, Commerce recalculated Usinor's CVD rate to be 7.72% *ad valorem*.

III. Standard of Review

The court must evaluate whether the remand findings are supported by substantial evidence on the record or otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B). "Substantial evidence is more than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). To determine if the agency's interpretation of the statute is in accordance with law "we must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). The expressed will or intent of Congress on a specific issue is dispositive. *See Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 233–237 (1986). If the court determines that the statute is silent or ambiguous, the question to be asked is whether the agency's construction of the statute is permissible. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). This deference is due when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.* 121 S.Ct. 2164, 1271 (2001). This is not limited to notice and comment rulemaking but is given to those "statutory determinations that are articulated in any 'relatively formal administrative procedure.'" *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001). Therefore,

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[3] Article 4 of the French privatization law establishes procedures for designating "Stable Shareholders" under guidance from the Privatization Commission. *Usinor Verification Report* at 7, Feb. 19, 1999. The purpose seems to be to provide a core group of investors who are restricted from selling during the privatization process, in order to promote stability and project confidence in the sale.

[4] "Commerce assumes that when a company sells 'productive assets' during 'the average useful life,' a pro rata portion of that subsidy 'passes through' to the purchaser at the time of sale. Commerce then quantifies the assumed 'pass through' amount, makes adjustments based on the purchase price, allocates an amount to the year of investigation, and calculates the *ad valorem* subsidy rate." *Delverde III*, 202 F.3d at 1363 (citing *Affirmative Countervailing Duty Determination: Certain Steel From Prod. From Aus.*, 58 Fed. Reg. 37,217, 37,268–69 (1993)) (citation omitted). The court reaches a decision in this case solely on the issue of the effect of privatization, and, therefore, will not discuss which AUL is correct.

statutory interpretations articulated by Commerce during antidumping proceedings are entitled to judicial deference under *Chevron*. *Id.* at 1382. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

IV. Discussion

A. History of the Issue

A brief history of the privatization subsidy issue is appropriate. The applicable law attempts to level the playing field by imposing a countervailing duty on subsidized imported goods sold in the United States which materially injure a domestic industry. A subsidy is a financial benefit conferred on a natural or legal person (usually the producing company) by a government entity or agent. *See* 19 U.S.C. § 1677(B)

In the past twenty years many countries have moved to privatize state-owned enterprises and thereby shift major manufacturing activity from public to private entities. Thus many plants formerly run entirely or mostly under government finance and control are now under the control of private shareholders. The question then becomes: if the plant received non-recurring financial benefits when it was government owned and operated, do those benefits survive the privatization and are the new owners, therefore, subject to countervailing duties on products they export to the United States?

Commerce first confronted this issue in 1989 when it decided that no benefits had passed to the recently privatized firm under review because the sale was for full market value and at arm's length. *See Lime from Mexico; Preliminary Results of Changed Circumstances Countervailing Duty Administrative Review*, 54 Fed. Reg. 1,753, 1,754–55 (Jan. 17, 1989). By 1993, however, Commerce had changed its views in the context of steel countervailing duty investigations. Commerce ignored the change of ownership at fair market value, which it had found significant in *Lime from Mexico*, and held that the previously bestowed subsidies survived such a sale and thus it assumed a continuing benefit to the new owners. *See Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the U.K.*, 58 Fed. Reg. 6,237 (Jan. 27, 1993).[5] Commerce then issued a fuller explanation of its position on subsidies in the privatization context when it published the General Issue Appendix covering several different CVD investigations. *See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, General Issues Appendix*, 58 Fed. Reg. 37,217, 37,225 (July 9, 1993). In this new privatization methodology Commerce essentially assumed that a portion of the previously bestowed subsidy passed through to the new owners from the state owned entity depending on when it had been initially granted. In this methodology the life of the subsidy in years (calculated

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[5] The historical and political context of this decision is discussed in Julie Dunne, Note, Delverde *and the WTO's* British Steel Decision *Foreshadow More Conflict Where the WTO Subsidies Agreement, Privatization and the United States Countervailing Duty Law Intersect*, 17 Am. U. Int'l. L. Rev. 79, 89 n 38 (2001).

by a formula based on amortization of assets) was the critical component and whether the sale was for full market value had no significance.

Commerce's methodology of ignoring a sale at full market value was rejected by this court but reinstated by the Court of Appeals for the Federal Circuit. In *Saarstahl, AG v. United States,* 18 CIT 525, 858 F.Supp. 187 (CIT 1994) this court applied pre-URAA law[6] and held that subsidies are extinguished in a true arms-length sale for full market value because the value of the company includes the benefit of any previous subsidies which the buyer pays for at time of purchase, leaving no remaining competitive advantage.

The Federal Circuit disagreed, holding that Commerce's decision to countervail previously bestowed subsidies was reasonable absent an explicit mandate from Congress to the contrary and that the CIT should have deferred to Commerce's interpretation. *See Saarstahl AG v. United States,* 78 F.3d 1539, 1544 (Fed. Cir. 1996). The appeals court reasoned that the statute at issue did not require countervailable subsidies to confer a benefit and that once Commerce finds a governmental subsidy it can assess countervailing duties on the new entity if the private purchaser repaid none or only some of the subsidy received prior to privatization.

In December 1999, the World Trade Organization first addressed the issue in a case also originating in the steel industry. *See WTO Dispute Panel Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* No. WT/DS138/R (Dec. 23, 1999). The Panel examined Commerce's assessment of countervailing duties on steel after a complaint by the European Communities. Commerce had specifically determined that the privatization at issue was at arm's-length for fair market value and consistent with commercial considerations. *Panel Report,* ¶ 6.23. The Panel held that Commerce's decision to countervail was contrary to the definition of a subsidy contained in the *Agreement on Subsidies and Countervailing Measures*, Pt. I, Art. 1 (1994). Specifically the Panel stated, *inter alia*, that the existence of a benefit could only be found by comparing whether the recipient was better off than it would be without the contribution and that "the marketplace provides an appropriate basis for comparison * * * whether the recipient has re-

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[6] In 19 U.S.C. § 1677(5)(A)(ii) (1988) a subsidy was defined as "provided or required by government action to a specific enterprise or industry * * * whether paid or bestowed directly or indirectly on the manufacture, production or export of any class or kind of merchandise." This provision was amended in 1994 as part of the Uruguay Round Agreement Act to read as follows:

> (B) Subsidy described
> A subsidy is described in this paragraph in the case in which an authority—
> (i) provides a financial contribution,
> * * * * * * *
> to a person and *a benefit is thereby conferred.*

(Emphasis added).

The URAA also included 19 U.S.C. §1677(5)(F) which stated:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

This provision was widely thought to have been added in reaction to this court's opinion in *Saarstahl* which at the time of URAA enactment had not been reversed by the Federal Circuit. *See Delverde III,* 202 F.3d at 1367 n.3.

ceived a 'financial contribution' on terms more favorable than those available to the recipient in the market." *Panel Report*, ¶ 6.65. The Panel found that the privatization of a government owned company in an arm's length, fair market value transaction eliminates any benefit from prior subsidization. The United States appealed to the WTO's Appellate Body which upheld the Panel's Report and recommended "the United States [to] bring its measures found in the Panel Report, as upheld by this Report, to be inconsistent with its obligations under the SCM agreement into conformity with its obligations under that agreement." *WTO Dispute Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, No. WT/DS138/R at ¶ 76 (May 10, 2000).

The Federal Circuit noted the Panel decision in *Delverde III* when it reviewed a decision by this court in a CVD case involving pasta from Italy.[7] *See Delverde SrL v. United States*, 22 CIT 947, 24 F. Supp. 2d 314 (1998) *("Delverde II")*. Delverde, the foreign producer, had asked this court to review the imposition of CVD by Commerce when the department, using its General Issues Appendix methodology, held Delverde responsible for a pro-rata portion of nonrecurring subsidies that had been granted to the former owner. Initially, this court had agreed with Delverde's argument that Commerce could not assume the pro-rata portion survived the sale and remanded to Commerce to examine the sale itself to determine whether Delverde received a subsidy through its purchase of plant assets from an owner that had previously received subsidies. *Delverde Sr.L v. United States*, 21 CIT 1294, 989 F. Supp. 218 (1997)[8] *("Delverde I")*.

On remand, however, after Commerce had further explained its position, the result was different. This court found permissible Commerce's presumption of pass through of subsidies when it assessed benefit only at the time the subsidization occurred. *Delverde II*, 24 F. Supp. 2d at 317. The Federal Circuit disagreed, holding that the statutory language required Commerce to determine whether the purchaser received both a financial contribution and a benefit from a government before concluding that the purchaser was subsidized. *See Delverde III*, 202 F.3d at 1367. The court went on to instruct that Commerce examine the issue "based on the facts and circumstances, including the terms of the transaction. * * *" *Id.* at 1369–70. It specifically stated that its decision was not inconsistent with that of the WTO Dispute Panel. *Id.* at 1369.

B. What does Delverde require?

The court views the *Delverde* decision as central to the resolution of this case. The parties have sharply divergent views on the meaning of that decision and its application to the administrative action now before the court. Commerce asserts that, in accordance with the Federal Cir-

[7] The *Delverde* case will be discussed at length *infra* in this opinion.

[8] Both this court and the Federal Circuit assumed the sale in *Delverde* was between private entities. *Delverde III*, at 202 F.3d 1362.

cuit's holding in *Delverde III*, it formulated a new two-step inquiry to determine if prior subsidies passed through to the new privatized entity.

> Consistent with the Federal Circuit's analysis in *Delverde III*, Commerce announced a *two-step* inquiry. As the *Remand Determination* shows, Commerce first analyzes whether the pre-sale and post-sale entities are for all intents and purposes the same person. If they are, Commerce's analysis stops, as all of the elements of a subsidy will have been established with regard to the producer under investigation, *i.e.*, the post-sale entity. If, however, the two entities are not the same person, Commerce will proceed to the second step in its inquiry and will examine whether a subsidy has been provided to the post-sale entity through the change-in-ownership transaction itself.

Defendant's Mem. in Opp'n to Pls.' and Def.-Intervenors' Mot. for J. upon the Agency R. at 16–17 *("Def.'s Br.")*. After applying the two-step analysis to Usinor, Commerce concluded it did not have a duty to analyze whether the subsidies passed to Usinor because Usinor was the same "person" before and after the privatization. *Id.* at 18.

> After a lengthy review and analysis of the remand record, Commerce determined that government-owned Usinor and privatized Usinor were for all intents and purposes the same person. As a result, the prior subsidies remained attributable to privatized Usinor, as all of the elements of a subsidy were established with regard to privatized Usinor.
>
> With this outcome it became unnecessary for Commerce to proceed to the second step in its privatization analysis, which would have involved an inquiry into whether a subsidy had nevertheless been provided to the privatized entity through the privatization transaction itself. *Commerce, therefore, did not address the issue whether the transaction's purchase price had been fair market value.*

Id. at 18 (emphasis added). Therefore, since Commerce had previously determined that Usinor was the recipient of subsidies, it imputed the subsidies to Usinor after the privatization.

Usinor asserts the *Remand Determination* is contrary to *Delverde III* because Commerce "deems wholly irrelevant" the fact that Usinor was privatized through an arm's-length global public stock offering and failed to analyze the terms of the change in ownership transaction to determine if the subsidies passed through to the privatized entity . *Def.-Intervenors' Supplemental Mem. In Supp. of Mot. for J. Upon the Agency Record* at 3–4 *("Def.-Intervenors' Supp. Mem.")*. Usinor claims "Commerce's 'same person approach' * * * ignores the terms of the transaction and instead focuses exclusively on whether the newly-purchased entity is 'substantially the same business' as the company that received the subsidies. *Id.* at 3. Additionally, Usinor claims that the *Remand Determination* is contrary to Agreement on Subsidies and Countervailing Measures and inconsistent with the WTO decision in *Appellate Body Report on United States—Imposition of Countervailing Duties on Certain*

Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, No. WT/DS138/R at ¶ 76 (May 10, 2000). In the alternative, Usinor argues that "even if some type of 'same person' analysis were appropriate, the record facts relating to [Usinor's] privatization show that it was not the 'same person' following the privatization and thus should not be saddled with prior subsidies" *Def.-Intervenors' Supp. Mem.* at 4.

The central question is whether Commerce's application of its method complies with congressional intent embodied in the statutory language of 19 U.S.C. § 1677(5)(F), as interpreted by the Federal Circuit in *Delverde*. Consistent with the court of appeals' decision in *Delverde*, this court finds the statute's meaning to be clear, and, therefore, does not reach the issue of deference to Commerce's interpretation under the *Chevron* doctrine. *See Delverde III*, 202 F.3d at 1367. "[W]e need only determine whether Commerce's methodology is in accordance with the statute." *Id.* As noted above, the *Delverde* decision assumed the sale of assets from one private company to another. The question directly before the court was whether Commerce's methodology for determining a subsidy was permitted under the new statutory direction by Congress. Commerce assumed that when a company sells "productive assets" previously subsidized during their "average usual life" a pro rata portion of the subsidy "passes through." *Id.* at 1363.

The Federal Circuit struck down this methodology as not in accordance with 19 U.S.C. § 1677(5). The court characterized the method used in *Delverde* as a *per se* rule which avoided looking at the "facts and circumstances of the sale." *Delverde III*, 202 F.3d at 1364. The Federal Circuit stated:

> [W]e have come to the conclusion that the Tariff Act as amended does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically "passed through" to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from a government.

Id. at 1364. The court of appeals, therefore, interpreted section 1677(5) to prohibit Commerce from adopted any *per se* rule that a subsidy passes through, or is eliminated, with a change of ownership. *Id.* at 1366.

Commerce, the court granted, did have some flexibility to establish a methodology for calculating the financial contribution and benefit conferred on a person. *Id.* However, contrary to Commerce's assertion in the case now before the court, the *Delverde* court expressed no doubt that the new statute required two actions from Commerce: one, that the terms of the sale must be examined, and must include analysis of the entire transaction to determine if the subsidy (not the corporate identity) passed through to a person now under investigation. *Id.* at 1365–66. In addition, such examination must focus on the new owner. According to

the *Delverde* decision, the term "person" is not open to interpretation. The court said that "person" means the purchaser of the asset.

> [W]e conclude that the statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person, either directly or indirectly, by one of the acts enumerated, before charging it with receipt of a subsidy, *even when that person bought corporate assets from another person* who was previously subsidized.

Id. at 1366 (emphasis added). In *Delverde* the purchaser was a private company, buying some portion of a subsidized company's assets. In the instant case, the purchasers are the shareholders of the newly privatized company buying all the assets of the company in an initial public offering from the Government of France. In either case, the Federal Circuit's teachings are clear that in order to countervail the imported product, "Commerce must find that the purchaser *indirectly* received subsidies from a government." *Id.* at 1367 (emphasis in original).

The Federal Circuit emphasizes that the legislative history supports a reading of the statute, "as plainly requiring Commerce to make a determination that a purchaser of corporate assets received both a financial contribution and a benefit from a government. * * *" *Id.* The court was even more specific and found the methodology contrary to law because,

> [i]t did not consider *any* of the facts or circumstances of the sale relevant. Commerce produced no evidence that Delverde received goods for less than "adequate remuneration."

Id. (emphasis in original).

The court in *Delverde* did not have Commerce's novel "personhood" methodology before it, but was explicit enough in its description of when a rule can be considered *per se* that the decision provides clear guidance. A methodology is *per se,* and therefore contrary to the statute, when it determines that a subsidy continues to be countervailable to a new owner following a change in ownership without looking at the transaction itself. *Id.* The Federal Circuit directed that any methodology must examine the facts of the sale to determine if the new owner, "paid full value for the asset and thus received no benefit from the prior owner's subsidies. * * *" *Id.* at 1368. Such an analysis must focus on the new owner, since that entity is the producer of the goods at issue during the period of investigation under review.

The *Delverde III* court did note that there are differences between the sale of a single asset and a wholesale privatization. A private seller will presumably always seek the highest price for its assets, while a government may have other goals. *Id.* at 1369. Similarly, there are differences between the elements of the transaction which must be evaluated when the sale is of a single asset or is a privatization of an entire company through the sale of stock. These differences, however, do not alter the statutory requirements for determining if a financial contribution and benefit was conferred on the new owner. Variations in the structure of a

transaction and the motives of the parties involved do not relieve Commerce of its responsibility to look at the facts and circumstances of the sale to determine if the new owner received directly or indirectly a subsidy for which it did not pay "adequate remuneration." *Id.* at 1368.

Finally, the Federal Circuit, to re-enforce its underlying reasoning and amplify the analysis required of Commerce, referred to the WTO decision in *British Steel*. There, as noted above, when looking at the facts of government privatization of a steel company, where the terms were at arms-length and for fair market value, the WTO determined no subsidy passed through to the new owners. The Federal Circuit emphasized that its reasoning in *Delverde* is not inconsistent with the WTO's reasoning in *British Steel*. *Id.* at 1369. The court reads this portion of the *Delverde* opinion to mean that any methodology adopted Commerce must recognize the possibility that a subsidy can be extinguished by a privatization, even the privatization of an entire company, if a thorough analysis of the transaction supports that conclusion.

The Federal Circuit in *Delverde* laid out certain criteria that at a minimum any new methodology must include. First, Commerce cannot rely on any *per se* rule. Second, it must look at the facts and circumstances of the TRANSACTION, to determine if the PURCHASER, received a subsidy, directly or indirectly, for which it did not PAY ADEQUATE COMPENSATION. In this instance, Commerce avoids examining the terms of the sale by arguing that under the four-part test it developed, if the pre- and post-corporation is the same person, it is not required to determine if the subsidy it found to exist pre-privatization continues post-privatization. This argument contravenes the Federal Circuit's holding in *Delverde III*.

From *Delverde III*, it is evident that the court interpreted section 1677(5)(F) as *requiring* Commerce to determine if the subsidy continued to benefit the post-privatized corporation. In this instance, Commerce has developed a methodology that circumvents its statutorily mandated duty to determine if a benefit was conferred on the privatized corporation. To determine if Usinor was the same "person" Commerce used a four-factor test based on general corporate law principles.

> [W]here appropriate and applicable we would analyze such factors as (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise, as may be indicated, for example, by the use of the same name, (2) continuity of production, (3) continuity of assets and liabilities, and (4) retention of personnel. * * * [T]he Department will generally consider the post-sale entity to be the same person as the pre-sale entity if, based on the totality of the factors considered, we determine that the entity sold in the change-in-ownership transaction can be considered a continuous business entity because it operated in substantially the same manner before and after the change in ownership.

Remand Determination at 14–15.[9] Commerce has erroneously read *Delverde III* as leaving the analysis of the privatization transaction to its discretion. It is clear the method used to analyze the privatization transaction is left to the discretion of Commerce. *See Delverde III* 202 F.3d at 1367, citing H.R. Rep. No. 103–826(I), at 110 (1994). However, Commerce is required to examine the transaction to determine if a financial contribution and benefit "passed through" to the privatized corporation. *See* 19 U.S.C. § 1677(5)(B).

Although Commerce's "person" analysis is not an explicit *per se* rule, it still fails to meet the requirements of the statute because it concludes that a purchaser received a subsidy without making "specific findings of financial contribution and benefit * * * that are required by §§ 1677(5)(D) and (E)." *Delverde III*, 202 F.3d at 1367. An initial public offering of a formerly government controlled corporation will often involve the same entity pre- and post-sale using Commerce's criteria. Indeed, in nearly every circumstance that a state-run enterprise is privatized as a whole entity, Commerce would be able to find that the same "person" exists. Commerce's use of a methodology that eliminated the need to determine if the subsidies passed through to the privatized entity in this situation was specifically rejected by the Federal Circuit in *Delverde III*.

> Commerce's methodology conclusively presumed that Delverde received a subsidy from the Italian government—*i.e.*, a financial contribution and a benefit, simply because it bought assets from another person who earlier received subsidies. Commerce deemed the fact that Delverde bought the assets, as agreed to by both parties, at fair market value to be *irrelevant* to the determination whether it received a subsidy. It did not consider *any* of the facts and circumstances of the sale relevant. Commerce produced no evidence that Delverde received goods at less than "adequate remuneration."

Id. (citations omitted). As the holding in *Delverde III* mandates, the change in ownership triggers Commerce's duty under 19 U.S.C. § 1677(5)(D) and (E) to determine if privatized Usinor received a financial contribution and benefit from the French Government. Therefore, the court finds that Commerce's failure to analyze the privatization transaction to determine if Usinor received a subsidy after it was privatized is contrary to *Delverde III* and the statutory intent of section 1677(5)(F).

The court recognizes that the Usinor privatization is a complex transaction. This, however, only heightens the need for in-depth and focused analysis. A short review of the privatization reveals several facts ignored

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[9] Commerce does not cite to any precedents or other supporting sources for using this test, other than a Corporation Practice Guide and to say it is "how this type of issue has been handled under U[nited] S[tates] law in the general corporate context." *Remand Determination* at 10. It appears to be similar to one used by courts to determine if successor corporations are still liable to third parties, who are not parties to the merger, for the actions of the original corporation. *See e.g. Fehr Bros., Inc. v. Scheinman*, 121 A.D.2d 13, 17, 509 N.Y.S.2d 304, 307 (N.Y. App. Div. 1986). The court is not persuaded that this test applies here. In this case there is no reason for Commerce to default to a corporate law analysis because the facts of the sale will disclose whether the new owners compensated the government for previous subsidies.

by Commerce in its *Remand Determination*, which may prove significant to the required inquiry. In 1995 the French Government moved to privatize Usinor. *Final Determination*, 64 Fed. Reg. at 30,776. France publically announced the decision to privatize on May 31, 1995. An invitation to bid on shares published in the Official Gazette in June 1, 1995. *Usinor Verification Report* at 7 (Feb. 19, 1999). The price of those shares was determined by the French Privatization Commission, based on a valuation report by outside financial banking firms, Paribas and SBC Warburg. *Id.* at 8.

The Privatization Commission is an independent body. Members serve five year terms and cannot be removed other than in extreme circumstances. *Government of France Verification Report* at 2 (Feb. 21, 1999). Generally, the Commission, relying on the analysis of the outside banks, sets a market value to price the stock for a privatization. In this case Usinor's value was compared to other steel companies in Europe. *Usinor Verification Report* at 7. The Commission will allow a privatization to go forward only if the stock can be sold above the minimum price set by the Commission. So, in theory, no company will be sold at less than fair market value under the French law. *Government of France Verification Report* at 3.

The privatization of the controlling interest here involved two public offerings. 64 Fed. Reg. 30,776. The French public offering was set at FF 86 per share. The international public offering was set at FF 89. *Usinor Verification Report at* 7. In addition an employee offering was done with the price ranging from FF 68.8 to FF 86, and a sale of certain stock at FF 90.78, was placed with so-called "Stable Shareholders." *Id.* At the end of 1995, the French Government retained a 9.8% interest in Usinor. *Mem. in Supp. of Mot. for J. on the Agency Record*, June 16, 2000, at 6. *("Def.-Intervenors' Initial Br.")* International or French public investors held 82% of the stock. *Def.'s Br. at 5.* The remaining stock was held by stable shareholders and employees of Usinor. 64 Fed. Reg. 30,776.

In 1997, France distributed most of its remaining stock, so that it held less than 1%. *Def.-Intervenors' Initial Br.* at 6. The Government of France turned over this stock, without compensation, to stable shareholders and employees who held their initial purchase of stock for a required time. 64 Fed. Reg. 30,776. By 1998 the government had completely divested itself of Usinor. *Id.* Even this cursory examination of the record raises several questions. Some facts point to the probability that the stock offering represented a true arms-length transaction for fair market value, which may include "adequate remuneration" to the government by the new owners for any previous subsidies bestowed. Other facts point to possible mechanisms, such as the use of "stable shareholders," that could provide a vehicle for subsidy pass-through. On remand it is imperative, and required by 19 U.S.C. § 1677(5), as interpreted by the court in *Delverde III*, that Commerce examine the details of the transaction to determine if goods imported by Usinor during the POI of 1997 were subsidized.

V. Conclusion

For the foregoing reasons, the court holds that the Department's *Final Results of Redetermination Pursuant to Court Remand: Allegheny-Ludlum Corp., et al v. United States,* No. 99–09–00566 (December 20, 2000) is not in accordance with law and therefore will be remanded to the agency for review and action consistent with this opinion.

So Ordered.

(Slip Op. 02–02)

GTS Industries S.A., plaintiff *v.* United States, defendant, and U.S. Steel Group, A Unit of USX Corp, et al., defendant-intervenors

Consolidated Court No. 00–03–00118

[Plaintiff's Motion for Judgment Upon an Agency Record granted in part and remanded.]

(Decided January 4, 2002)

deKieffer & Horgan, (Donald E. deKieffer, J Kevin Horgan, Marc E. Montalbine), for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division United States Department of Justice, *(David D'Allessandris); Terrence J. McCartin, Boguslawa B. Thoemmes,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

Dewey Ballantine LLP, (John A. Ragosta, John R. Magnus), Hui Yu, for Defendant-Intervenors.

Memorandum Opinion and Order

I. Introduction

Barzilay, *Judge:* In this case, the court is asked, yet again, to review the subsidy calculation methodology employed by the Department of Commerce ("Commerce") during countervailing duty investigations and reviews to determine under what circumstances a privatized company is the recipient of a benefit pursuant to United States law. This case comes before the court pursuant to Plaintiff's and Defendant Intervenors' USCIT R. 56.2 Motions for Judgment Upon an Agency Record. Plaintiff and Defendant-Intervenors challenged certain aspects of the final determination of the Department of Commerce International Trade Administration's countervailing duty investigation of carbon-quality steel plate from France. *See Final Affirmative Countervailing Duty Determination: Certain Cut-to-length Carbon-Quality Steel Plate from France,* 64 Fed. Reg. 73,277 (Dec 29, 1999) *("Final Determination").* While this case was pending before the court, the Federal Circuit issued its opinion in *Delverde SrL v. United States,* 202 F.3d 1360 (Fed.

Cir. 2000) *reh'g denied* Ct. No. 99–1186 (June 20, 2000) (*"Delverde III"*). On July 31, 2000, defendant United States requested a remand to Commerce to consider the impact of the Federal Circuit's holding in *Delverde III* to the facts of this case. The subsequent remand order instructed Commerce "(1) to determine the applicability, if any, of the decision by the Court of Appeals for the Federal Circuit in *Delverde SrL v. United States* 202 F.3d 1360 (Fed. Cir. 2000) *reh'g denied* (June 20, 2000) to this proceeding, and (2) embark upon further fact finding if appropriate * * *." *Remand Order* (August 9, 2000). The court now reviews Commerce's *Final Results of Redetermination Pursuant to Court Remand in GTS Industries S.A. v. United States,* Court No. 00–03–00118 (December 22, 2000) (*"Remand Determination"*).[1] The court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c)) (1994) which provides for judicial review of a final determination by the Department of Commerce in accordance with the provisions of 19 U.S.C. § 1516a(a)(2)(B)(I) (1994).

II. Background

On March 16, 1999, Commerce sought to investigate whether subsidies were given by the French Government to certain elements of the French steel industry. *See Initiation of Countervailing Duty Investigations: Certain Cut-to-Length Carbon-Quality Steel Plate From France, Indonesia, Italy, and the Republic of Korea,* 64 Fed. Reg. 12,996 (March 16, 1999). The period of investigation was calender year 1998. In its final affirmative determination, Commerce determined that GTS' total estimated CVD rate was 6.86%. *Final Determination,* 64 Fed. Reg. at 73,298.

> GTS' *ad valorem* rate is based entirely upon subsidies granted to Usinor prior to Usinor's 1995 privatization, and attributed to GTS in part when GTS was still a consolidated, majority-owned subsidiary of Usinor. Therefore, the main change in ownership transaction in this investigation is Usinor's 1995 privatization and, accordingly, we have analyzed this transaction. * * *

Remand Determination at 15.

The French Government was the majority owner of Usinor and Sacilor, another steel producer, until the mid-1980s. *See Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from France,* 64 Fed. Reg. 30,774, 30,776 (1999) (*"Usinor Final Determination"*). After a capital restructuring in 1986, France was the sole owner of both companies. *Id.* In 1987, France placed Usinor and Sacilor under the ownership of a holding company, with the holding company retaining the Usinor name. *Id.* In 1991, Credit Lyonnais, a government-owned bank, purchased 20% of Usinor. *Id.* Beginning in the summer of 1995 and continuing through 1996 and 1997, the French Government privatized Usinor through a public stock offering. *Id.* By the end of 1997, the vast majority of Usinor's shares were owned by pri-

[1] This case is a companion case to *Allegheny Ludlum Corp., et al., v. United States,* 26 CIT ___ (2002). *Allegheny* involved imports from GTS' parent company Usinor and the same privatization transaction is at issue.

vate shareholders, with the remaining shares owned by employees and "stable shareholders."[2] *Id.*

Prior to 1992, Usinor owned approximately 90% of GTS. *Final Determination*, 64 Fed. Reg. at 73,278. From 1992 to1995, Usinor reduced its holding in GTS. *Id.* Through two separate transactions, one occurring in 1992 and the other in 1996, Usinor transferred a majority of interest in GTS to AG der Dillinger Huttenwerks ("Dillinger"). *Id.* However, Usinor retained a 48.75% interest in the holding company Dillinger which in turn, owed 99% of GTS. *Id.* Despite the public stock offering that privatized Usinor, Commerce concluded in the *Remand Determination* that Usinor was the "same person" after the privatization and, since it had already determined that Usinor had previously received subsidies, it did not have to analyze whether the past subsidies were extinguished by the change in ownership transaction. *Remand Determination*

at 14. Therefore, Commerce used a 14-year average useful life ("AUL") to allocate the benefits bestowed by the nonrecurring subsidies.[3] Similarly, Commerce determined that GTS, since it had been a majority-owned subsidiary of Usinor, had also received countervailable subsidies that had not been extinguished by the privatization transaction. *Id.* at 16. Based upon its findings, Commerce recalculated GTS' CVD rate to be 6.10% *ad valorem*. *Id.* at 43. GTS disputes this finding on several grounds but the issue of subsidy pass through is central.[4]

III. Standard of Review

The court must evaluate whether the remand findings are supported by substantial evidence on the record or otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B). "Substantial evidence is more than a mere scintilla;" it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). To determine if the agency's interpretation of the statute is in accordance with law "we must first carefully investigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). The expressed will or intent of Congress on a specific issue is dis-

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[2] The French privatization law establishes procedures for designating "Stable Shareholders." *GTS Questionnaire Response* at 15 (Sept. 19, 2000). The purpose seems to be to provide a core group of investors who are restricted from selling during the privatization process, in order to promote stability and project confidence in the sale.

[3] "Commerce assumes that when a company sells 'productive assets' during 'the average useful life,' a pro rata portion of that subsidy 'passes through' to the purchaser at the time of sale. Commerce then quantifies the assumed 'pass through' amount, makes adjustments based on the purchase price, allocates an amount to the year of investigation, and calculates the *ad valorem* subsidy rate." *Delverde III*, 202 F.3d at 1363 (citing *Affirmative Countervailing Duty Determination: Certain Steel From Prod. From Aus.*, 58 Fed. Reg. 37,217, 37,268–69 (1993)) (citation omitted).

[4] GTS also challenges Commerce's use of (1) a 14-year AUL to allocate the benefits bestowed by nonrecurring subsidies, (2) sales values instead of total asset values to calculate the amount of subsidies allocable to GTS which increased the margin significantly from the preliminary to the final determination, (3) an allocation method that failed to allocate subsidies based upon Usinor's retained ownership interest in GTS, and (4) the use of "facts available" in analyzing the change in ownership transactions in 1992 and1996. Defendant-Intervenors challenge the methodology used by Commerce to allocate non-recurring subsidies. In the interest of judicial economy the court reaches a decision in this phase of the case solely on the issue of the effect of Usinor's privatization. Once Commerce properly analyzes the privatization transaction, it may not be necessary to reach the other issues.

positive. *See Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 233–237 (1986). If the court determines that the statute is silent or ambiguous, the question to be asked is whether the agency's construction of the statute is permissible. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). This deference is due when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.* 121 S.Ct. 2164, 1271 (2001). This is not limited to notice and comment rulemaking but are given to those "statutory determinations that are articulated in any 'relatively formal administrative procedure'" *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001). Therefore, statutory interpretations articulated by Commerce during antidumping proceedings are entitled to judicial deference under *Chevron*. *Id.* at 1382. Essentially, this is an inquiry into the reasonableness of Commerce's interpretation. *See Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

IV. Discussion

A. History of the Issue

A brief history of the privatization subsidy issue is appropriate. The applicable law attempts to level the playing field by imposing a countervailing duty on subsidized imported goods sold in the United States which materially injure a domestic industry. A subsidy is a financial benefit conferred on a natural or legal person (usually the producing company) by a government entity or agent. *See* 19 U.S.C. § 1677(B).

In the past twenty years many countries have moved to privatize state-owned enterprises and thereby shift major manufacturing activity from public to private entities. Thus many plants formerly run entirely or mostly under government finance and control are now under the control of private shareholders. The question then becomes: if the plant received non-recurring financial benefits when it was government owned and operated, do those benefits survive the privatization and are the new owners, therefore, subject to countervailing duties on products they export to the United States?

Commerce first confronted this issue in 1989 when it decided that no benefits had passed to the recently privatized firm under review because the sale was for full market value and at arm's length. *See Lime from Mexico; Preliminary Results of Changed Circumstances Countervailing Duty Administrative Review*, 54 Fed. Reg. 1,753, 1,754–55 (Jan. 17, 1989). By 1993, however, Commerce had changed its views in the context of steel countervailing duty investigations. Commerce ignored the change of ownership at fair market value, which it had found significant in *Lime from Mexico*, and held that the previously bestowed subsidies survived such a sale and thus it assumed a continuing benefit to the new owners. *See Certain Hot Rolled Lead and Bismuth Carbon Steel Prod-*

ucts from the U.K., 58 Fed. Reg. 6,237 (Jan. 27, 1993).[5] Commerce then issued a fuller explanation of its position on subsidies in the privatization context when it published the General Issue Appendix covering several different CVD investigations. *See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, General Issues Appendix*, 58 Fed. Reg. 37,217, 37,225 (July 9, 1993). In this new privatization methodology Commerce essentially assumed that a portion of the previously bestowed subsidy passed through to the new owners from the state owned entity depending on when it had been initially granted. In this methodology the life of the subsidy in years (calculated by a formula based on amortization of assets) was the critical component and whether the sale was for full market value had no significance.

Commerce's methodology of ignoring a sale at full market value was rejected by this court but reinstated by the Court of Appeals for the Federal Circuit. In *Saarstahl, AG v. United* States, 18 CIT 525, 858 F. Supp.187 (1994) this court applied pre-URAA law[6] and held that subsidies are extinguished in a true arms-length sale for full market value because the value of the company includes the benefit of any previous subsidies which the buyer pays for at time of purchase, leaving no remaining competitive advantage.

The Federal Circuit disagreed, holding that Commerce's decision to countervail previously bestowed subsidies was reasonable absent an explicit mandate from Congress to the contrary and that the CIT should have deferred to Commerce's interpretation. *See Saarstahl AG v. United States*, 78 F.3d 1539, 1544 (Fed. Cir. 1996). The appeals court reasoned that the statute at issue did not require countervailable subsidies to confer a benefit and that once Commerce finds a governmental subsidy it can assess countervailing duties on the new entity if the private purchaser repaid none or only some of the subsidy received prior to privatization.

In December 1999, the World Trade Organization first addressed the issue in a case also originating in the steel industry. *See WTO Dispute Panel Report on United States—Imposition of Countervailing Duties on*

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[5] The historical and political context of this decision is discussed in Julie Dunne, Note, Delverde *and the WTO's* British Steel Decision *Foreshadow More Conflict Where the WTO Subsidies Agreement, Privatization and the United States Countervailing Duty Law Intersect*, 17 Am. U. Int'l L. Rev. 79, 89 n.38 (2001).

[6] In 19 U.S.C. § 1677(5)(A)(2)(1988) a subsidy was defined as "provided or required by government action to a specific enterprise or industry * * * whether paid or bestowed directly or indirectly on the manufacture, production or export of any class or kind of merchandise." This provision was amended in 1994 as part of the Uruguay Round Agreement Act to read as follows:

> (B) Subsidy described
> A subsidy is described in this paragraph in the case in which an authority
> (I) provides a financial contribution,
>
> * * * * * * *
>
> to a person and *a benefit is thereby conferred.*

(Emphasis added).

The URAA also included 19 U.S.C. §1677(5)(F) which stated:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

This provision was widely thought to have been added in reaction to this court's opinion in *Saarstahl* which at the time of URAA enactment had not been reversed by the Federal Circuit. *See Delverde III*, 202 F.3d at 1367 n.3.

Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, No. WT/DS138/R (Dec. 23, 1999). The Panel examined Commerce's assessment of countervailing duties on steel after a complaint by the European Communities. Commerce had specifically determined that the privatization at issue was at arm's-length for fair market value and consistent with commercial considerations. *Panel Report*, ¶ 6.23. The Panel held that Commerce's decision to countervail was contrary to the definition of a subsidy contained in the *Agreement on Subsidies and Countervailing Measures*, Pt. I, Art. 1 (1994). Specifically the Panel stated, *inter alia*, that the existence of a benefit could only be found by comparing whether the recipient was better off than it would be without the contribution and that "the marketplace provides an appropriate basis for comparison * * * whether the recipient has received a 'financial contribution' on terms more favorable than those available to the recipient in the market." *Panel Report*, ¶ 6.65. The Panel found that the privatization of a government owned company in an arm's length, fair market value transaction eliminates any benefit from prior subsidization. The United States appealed to the WTO's Appellate Body which upheld the Panel's Report and recommended "the United States [to] bring its measures found in the Panel Report, as upheld by this Report, to be inconsistent with its obligations under the SCM agreement into conformity with its obligations under that agreement." *WTO Dispute Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, No. WT/DS138/R at ¶ 76 (May 10, 2000).

The Federal Circuit noted the Panel decision in *Delverde III* when it reviewed a decision by this court in a CVD case involving pasta from Italy.[7] *See Delverde SrL v. United States*, 22 CIT 947, 24 F. Supp. 2d 314 (1998) ("*Delverde II*"). Delverde, the foreign producer, had asked this court to review the imposition of CVD by Commerce when the department, using its General Issues Appendix methodology, held Delverde responsible for a pro-rata portion of nonrecurring subsidies that had been granted to the former owner. Initially, this court had agreed with Delverde's argument that Commerce could not assume the pro-rata portion survived the sale and remanded to Commerce to examine the sale itself to determine whether Delverde received a subsidy through its purchase of plant assets from an owner that had previously received subsidies. *Delverde Sr.L v. United States*, 21 CIT 1294, 989 F. Supp. 218 (1997)[8] *("Delverde I")*.

On remand, however, after Commerce had further explained its position, the result was different. This court found permissible Commerce's presumption of pass through of subsidies when it assessed benefit only at the time the subsidization occurred. *Delverde II*, 24 F. Supp. 2d at 317.

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[7] The *Delverde* case will be discussed at length *infra* in this opinion.

[8] Both this court and the Federal Circuit assumed the sale in *Delverde* was between private entities. *Delverde III*, at 202 F.3d 1362.

The Federal Circuit disagreed, holding that the statutory language required Commerce to determine whether the purchaser received both a financial contribution and a benefit from a government before concluding that the purchaser was subsidized. 202 F.3d at 1367. The court went on to instruct that Commerce examine the issue "based on the facts and circumstances, including the terms of the transaction * * *" *Id.* at 1369–70. It specifically stated that its decision was not inconsistent with that of the WTO Dispute Panel. *Id.* at 1369.

B. What does Delverde require?

The court views the *Delverde* decision as central to the resolution of this case. The parties have sharply divergent views on the meaning of that decision and its application to the administrative action now before the court. Commerce asserts that, in accordance with the Federal Circuit's holding in *Delverde III,* it formulated a new two-step inquiry to determine if prior subsidies passed through to the new privatized entity.

> Consistent with the Federal Circuit's analysis in *Delverde III*, Commerce announced a two-step inquiry. Commerce first analyzes whether the pre-sale and post-sale entities are for all intents and purposes the same person. If they are, Commerce's analysis stops, as all of the elements of a subsidy will have been established with regard to the producer under investigation, *i.e.*, the post-sale entity. However, if the two entities are not the same person, Commerce will proceed to the second step in its inquiry and will examine whether a subsidy has been provided to the post-sale entity through the change-in-ownership transaction itself.

Def.'s Mem. In Opp'n to Pl.'s and Def.-Intervenors' Mot. for J. Upon Agency R. at 15. *("Def.'s Br.").* After applying the two-step analysis to Usinor, Commerce concluded it did not have a duty to analyze whether the subsidies passed to Usinor because Usinor was the same "person" before and after the privatization. *Id* at 16.

> After a lengthy review and analysis of the remand record, Commerce determined that government-owned Usinor and privatized Usinor were for all intents and purposes the same person. As a result, the prior subsidies remained attributable to privatized Usinor, as all of the elements of a subsidy were established with regard to privatized Usinor. Thus, it was unnecessary for Commerce to proceed to the second step in its privatization analysis, which would have involved an inquiry into whether a subsidy had nevertheless been provided to the privatized entity through the privatization transaction itself.

Id. Therefore, since Commerce had previously determined that Usinor was the recipient of subsidies, it imputed the subsidies to Usinor and, therefore, GTS after the privatization.

GTS asserts the *Remand Determination* is contrary to *Delverde III* because Commerce "simply applied an irrebuttable presumption that, because post-privatized Usinor 'continued to operate, for all intents and purposes, as the same 'person' that existed prior to the privatization,'

the pre-privatization subsidies are presumed to provide a continuing benefit to GTS." *Pl.'s Mem. in Supp. of Mot. for J. Upon the Agency Record* at 14 *("Pl.'s Br.")* (quoting *Remand Determination* at 19). GTS claims "[b]ecause the owners of the newly privatized Usinor paid full market value for the company in an arm's length transaction based upon commercial considerations, the newly privatized company received no benefit from the subsidies bestowed before privatization." *Pl.'s Br.* at 21. Additionally, GTS claims that the *Remand Determination* is contrary to the Agreement on Subsidies and Countervailing Measures and inconsistent with the WTO decision in *Appellate Body Report on United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, No. WT/DS138/R at ¶ 76 (May 10, 2000). *See Pl.'s Br.* at 11–13.

The central question is whether Commerce's application of its method complies with congressional intent embodied in the statutory language of 19 U.S.C. § 1677(5)(F), as interpreted by the Federal Circuit in *Delverde*. Consistent with the court of appeals' decision in *Delverde*, this court finds the statute's meaning to be clear, and, therefore, does not reach the issue of deference to Commerce's interpretation under the *Chevron* doctrine. *See Delverde III*, 202 F.3d at 1367. "We need only determine whether Commerce's methodology is in accordance with the statute." *Id.* As noted above, the *Delverde* decision assumed the sale of assets from one private company to another. The question directly before the court was whether Commerce's methodology for determining a subsidy was permitted under the new statutory direction by Congress. Commerce assumed that when a company sells "productive assets" previously subsidized during their "average usual life" a pro rata portion of the subsidy "passes through." *Id.* at 1363.

The Federal Circuit struck down this methodology as not in accordance with 19 U.S.C. § 1677(5). The court characterized the method used in *Delverde* as a *per se* rule which avoided looking at the "facts and circumstances of the sale." *Delverde III*, 202 F.3d at 1364. The Federal Circuit stated:

> [W]e have come to the conclusion that the Tariff Act as amended does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically "passed through" to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from a government.

Id. at 1364. The court of appeals, therefore, interpreted section 1677(5) to prohibit Commerce from adopted any *per se* rule that a subsidy passes through, or is eliminated, with a change of ownership. *Id.* at 1366.

Commerce, the court granted, did have some flexibility to establish a methodology for calculating the financial contribution and benefit con-

ferred on a person. *Id.* However, contrary to Commerce's assertion in the case now before the court, the *Delverde* court expressed no doubt that the new statute required two actions from Commerce: one, that the terms of the sale must be examined, and must include analysis of the entire transaction to determine if the subsidy (not the corporate identity) passed through to a person now under investigation. *Id.* at 1365–66. In addition, such examination must focus on the new owner. According to the *Delverde* decision, the term "person" is not open to interpretation. The court said that "person" means the purchaser of the asset.

> [W]e conclude that the statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person, either directly or indirectly, by one of the acts enumerated, before charging it with receipt of a subsidy, *even when that person bought corporate assets from another person* who was previously subsidized.

Id. at 1366 (emphasis added). In *Delverde* the purchaser was a private company, buying some portion of a subsidized company's assets. In the instant case, the purchasers are the shareholders of the newly privatized company buying all the assets of the company in an initial public offering from the Government of France. In either case, the Federal Circuit's teachings are clear that in order to countervail the imported product, "Commerce must find that the purchaser *indirectly* received subsidies from a government." *Id.* at 1367 (emphasis in original).

The Federal Circuit emphasizes that the legislative history supports a reading of the statute, "as plainly requiring Commerce to make a determination that a purchaser of corporate assets received both a financial contribution and a benefit from a government. * * *" *Id.* The court was even more specific and found the methodology contrary to law because,

> [i]t did not consider *any* of the facts or circumstances of the sale relevant. Commerce produced no evidence that Delverde received goods for less than "adequate remuneration."

Id. (emphasis in original).

The court in *Delverde* did not have Commerce's novel "personhood" methodology before it, but was explicit enough in its description of when a rule can be considered *per se* that the decision provides clear guidance. A methodology is *per se,* and therefore contrary to the statute, when it determines that a subsidy continues to be countervailable to a new owner following a change in ownership without looking at the transaction itself. *Id.* The Federal Circuit directed that any methodology must examine the facts of the sale to determine if the new owner, "paid full value for the asset and thus received no benefit from the prior owner's subsidies. * * *" *Id.* at 1368. Such an analysis must focus on the new owner, since that entity is the producer of the goods at issue during the period of investigation under review.

The *Delverde III* court did note that there are differences between the sale of a single asset and a wholesale privatization. A private seller will

presumably always seek the highest price for its assets, while a government may have other goals. *Id.* at 1369. Similarly, there are differences between the elements of the transaction which must be evaluated when the sale is of a single asset or is a privatization of an entire company through the sale of stock. These differences, however, do not alter the statutory requirements for determining if a financial contribution and benefit was conferred on the new owner. Variations in the structure of a transaction and the motives of the parties involved do not relieve Commerce of its responsibility to look at the facts and circumstances of the sale to determine if the new owner received directly or indirectly a subsidy for which it did not pay "adequate remuneration." *Id.* at 1368.

Finally, the Federal Circuit, to re-enforce its underlying reasoning and amplify the analysis required of Commerce, referred to the WTO decision in *British Steel*. There, as noted above, when looking at the facts of government privatization of a steel company, where the terms were at arms-length and for fair market value, the WTO determined no subsidy passed through to the new owners. The Federal Circuit emphasized that its reasoning in *Delverde* is not inconsistent with the WTO's reasoning in *British Steel*. *Id.* at 1369. The court reads this portion of the *Delverde* opinion to mean that any methodology adopted Commerce must recognize the possibility that a subsidy can be extinguished by a privatization, even the privatization of an entire company, if a thorough analysis of the transaction supports that conclusion.

The Federal Circuit in *Delverde* laid out certain criteria that at a minimum any new methodology must include. First, Commerce cannot rely on any *per se* rule. Second, it must look at the facts and circumstances of the TRANSACTION, to determine if the PURCHASER, received a subsidy, directly or indirectly, for which it did not PAY ADEQUATE COMPENSATION. In this instance, Commerce avoids examining the terms of the sale by arguing that under the four-part test it developed, if the pre- and post-corporation is the same person, it is not required to determine if the subsidy it found to exist pre-privatization continues post-privatization. This argument contravenes the Federal Circuit's holding in *Delverde III*.

From *Delverde III*, it is evident that the court interpreted section 1677(5)(F) as *requiring* Commerce to determine if the subsidy continued to benefit the post-privatized corporation. In this instance, Commerce has developed a methodology that circumvents its statutorily mandated duty to determine if a benefit was conferred on the privatized corporation. To determine if Usinor was the same "person" Commerce used a four-factor test based on general corporate law principles.

> [W]here appropriate and applicable, we would analyze such factors as (1) continuity of general business operations, including whether the successor holds itself out as the continuation of the previous enterprise, as may be indicated, for example, by the use of the same name, (2) continuity of production, (3) continuity of assets and liabilities, and (4) retention of personnel. * * * [T]he Department will generally consider the post-sale entity to be the same person as the

> pre-sale entity if, based on the totality of the factors considered, we determine that the entity sold in the change-in-ownership transaction can be considered a continuous business entity because it operated in substantially the same manner before and after the change in ownership.

Remand Determination at 13.[9] Commerce has erroneously read *Delverde III* as leaving the analysis of the privatization transaction to its discretion. It is clear the method used to analyze the privatization transaction is left to the discretion of Commerce. *See Delverde III* 202 F.3d at 1367, *citing* H.R. Rep. No. 103–826(I), at 110 (1994). However, Commerce is *required* to examine the transaction to determine if a financial contribution and benefit "passed through" to the privatized corporation. *See* 19 U.S.C. § 1677(5)(B).

Although Commerce's "person" analysis is not an explicit *per se* rule, it still fails to meet the requirements of the statute because it concludes that a purchaser received a subsidy without making "specific findings of financial contribution and benefit * * * that are required by §§ 1677(5)(D) and (E)." *Delverde III*, 202 F.3d at 1367. An initial public offering of a formerly government controlled corporation will often involve the same entity pre- and post-sale using Commerce's criteria. Indeed, in nearly every circumstance that a state-run enterprise is privatized as a whole entity, Commerce would be able to find that the same "person" exists. Commerce's use of a methodology that eliminated the need to determine if the subsidies passed through to the privatized entity in this situation was specifically rejected by the Federal Circuit in *Delverde III*.

> Commerce's methodology conclusively presumed that Delverde received a subsidy from the Italian government—*i.e.*, a financial contribution and a benefit, simply because it bought assets from another person who earlier received subsidies. Commerce deemed the fact that Delverde bought the assets, as agreed to by both parties, at fair market value to be *irrelevant* to the determination whether it received a subsidy. It did not consider *any* of the facts and circumstances of the sale relevant. Commerce produced no evidence that Delverde received goods at less than "adequate remuneration."

Id. at 1367. (citations omitted). As the holding in *Delverde III* mandates, the change in ownership triggers Commerce's duty under 19 U.S.C. § 1677(5)(D) and (E) to determine if privatized Usinor received a financial contribution and benefit from the French Government. Therefore, the court finds that Commerce's failure to analyze the privatization transaction to determine if Usinor and, therefore, GTS received a subsi-

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[9] Commerce does not cite to any precedents or other supporting sources for using this test, other than a Corporation Practice Guide. It appears to be similar to one used by courts to determine if successor corporations are still liable to third parties, who are not parties to the merger, for the actions of the original corporation. *See e.g. Fehr Bros., Inc. v. Scheinman*, 121 A.D.2d 13, 17, 509 N.Y.S.2d 304, 307 (N.Y. App. Div.1986). The court is not persuaded that this test applies here. In this case there is no reason for Commerce to default to a corporate law analysis because the facts of the sale will disclose whether the new owners compensated the government for previous subsidies.

dy after it was privatized is contrary to *Delverde III* and the statutory intent of section 1677(5)(F).

The court recognizes that the Usinor privatization is a complex transaction. This, however, only heightens the need for in-depth and focused analysis. A short review of the privatization reveals several facts ignored by Commerce in its *Remand Determination*, which may prove significant to the required inquiry. In 1995 the French Government moved to privatize Usinor. *Usinor Final Determination*, 64 Fed. Reg. at 30,776. The privatization of the controlling interest here involved two public offerings. *Id.* The French public offering was set at FF 86 per share. *GTS Questionnaire Response* at 9 (Sept. 19, 2000) The international public offering was set at FF 89. *Id.* In addition, there was an employee offering and a sale of certain stock at a 2% premium over the international offering was placed with so-called "Stable Shareholders." *Id.*

In 1997, France distributed most of its remaining stock, so that it held less than 1%. *Usinor Final Determination,* 64 Fed. Reg at 30,776. The Government of France turned over this stock, without compensation, to stable shareholders and employees who held their initial purchase of stock for a required time. *Id.* By 1998, the government had completely divested itself of Usinor. *Id.* Even this cursory examination of the record raises several questions. Some facts point to the probability that the stock offering represented a true arms-length transaction for fair market value, which may include "adequate remuneration" to the government by the new owners for any previous subsidies bestowed. Other facts point to possible mechanisms, such as the use of "stable shareholders," that could provide a vehicle for subsidy pass-through. On remand it is imperative, and required by 19 U.S.C. § 1677(5), as interpreted by the court in *Delverde III,* that Commerce examine the details of the Usinor privatization transaction to determine if goods imported by GTS during the POI of 1998 were subsidized.

V. Conclusion

For the foregoing reasons, the court holds that the Department's *Final Results of Redetermination Pursuant to Court Remand in GTS Industries S.A. v. United States,* Ct. No. 00–03–00118 (December 22, 2000) is not in accordance with law and therefore will be remanded to the agency for review and action consistent with this opinion.

(Slip Op. 02–03)

CONSOLIDATED BEARINGS CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–09–02799

(Dated January 8, 2002)

ORDER

TSOUCALAS, *Senior Judge:* The case at bar comes before this Court as a result of the Court's decision in *Consolidated Bearings Co. v. United States ("Consolidated Bearings")*, 25 CIT ____, 166 F. Supp. 2d 580 (2001), and concerns the events that followed the issuance of *Final Results of Antidumping Duty Administrative Review of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 56 Fed. Reg. 31,692 (July 11, 1991), as amended by *Amended Final Results of Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Germany*, 62 Fed. Reg. 32,755 (June 17, 1997), by the United States Department of Commerce, International Trade Administration ("Commerce").

Specifically, on September 9, 1997, Commerce instructed the United States Customs Service ("Customs") to liquidate, at a certain "manufacturer's" rate, entries of the merchandise produced by FAG Kugelfischer Georg Schaefer KGaA ("FAG Kugelfischer") and imported by certain importers, the list of which did not include Consolidated Bearings Company ("Consolidated Bearings"), an entity that imported the merchandise manufactured by FAG Kugelfischer as well as other merchandise. Almost a year later, on August 4, 1998, Commerce sent liquidation instructions ("Liquidation Instructions") to Customs requiring Customs to liquidate the merchandise that was: (1) produced in Germany; (2) imported by any importer; and (3) still remained unliquidated after the application of prior liquidation instructions including that of September 9, 1997, at the deposit rate required at the time of entry of the merchandise. Under the Liquidation Instructions, Customs had to assess Consolidated Bearings' entries at the rate much higher than the "manufacturer's" rate determined by Commerce for FAG Kugelfischer.

Consequently, Consolidated Bearings moved pursuant to USCIT R. 56.1 for judgment upon the agency record challenging the Liquidation Instructions issued by Commerce and alleging that the Liquidation Instructions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Court granted Consolidated Bearings' motion and remanded this case to Commerce to: (a) annul the Liquidation Instructions issued by Commerce on August 4, 1998; and (b) take further actions not inconsistent with this opinion. *See Consolidated Bearings*, 25 CIT at ____, 166 F. Supp. 2d at 593. The Court particularly explained that the remand was caused by: (1) the insufficiency of Commerce's explanation about Commerce's reasons for the issuance of

the Liquidation Instructions, *see id.* 25 CIT at ___, 166 F. Supp. 2d at 590–92; and (2) the deficiencies of the Liquidation Instructions evincing Commerce's acknowledgment that Consolidated Bearings' imports of FAG Kugelfischer's merchandise could have been liquidated previously and legitimately under the rates given in the instructions of September 9, 1997.

On November 6, 2001, Commerce filed *Final Results of Redetermination Pursuant to Ct. Remand ("Remand Results")* for *Consolidated Bearings,* 25 CIT ___, 166 F. Supp. 2d 580. In the *Remand Results,* Commerce explains that Commerce: (1) possesses no information on whether Consolidated Bearings' purchases of FAG Kugelfischer's merchandise were direct, *see Remand Results* at 3; (2) "surmise[s] * * * that Consolidated [Bearings] purchased the [merchandise] from an intermediate party," *id.* at 4; (3) "find[s] it inappropriate to instruct" Customs to liquidate Consolidated Bearings' merchandise at FAG Kugelfischer's rates, *id.* at 5; and (4) devises two alternative approaches (one of which provides for "three alternative rates" for different types of Consolidated Bearings' merchandise) to be used instead of the approach given in the September 9, 1997, liquidation instructions because "the Court did not specify any alternative rates [Commerce] should consider." *Id.* at 3, 6–8.

While the Court appreciates the care and consideration and recognizes the creativity Commerce put into creation of alternative approaches and alternative rates, it is obvious that Commerce misreads the purpose and the scope of the remand.

The gist of *Consolidated Bearings,* 25 CIT ___, 166 F. Supp. 2d 580, is that, within parameters of each administrative determination, Commerce is bound to each election Commerce makes. *Cf. SKF USA Inc. v. United States,* 263 F.3d 1369, 1382 (Fed. Cir. 2001). If Commerce issues liquidation instructions that Commerce contemplates to be applicable to a particular merchandise, Commerce cannot change its mind and enter "corrections" a year later or, as Consolidated Bearings correctly points out, three years later. *Accord* Pl.'s Comments Concerning Final Results of Redetermination Pursuant Ct. Remand at 3. If Commerce does not review a particular respondent but knowingly allows the imports of such respondent to be liquidated at a particular rate, Commerce is equally bound to such election. In this case, Commerce is bound by the September 9, 1997, liquidation instructions. If Commerce is unsatisfied with a potential application of those instructions, Commerce should have issued said instructions in a clearer manner. Indeed, it would be anomalous to suggest that Commerce could "fine tune" its determinations any time Commerce is displeased with the outcome of the application of a document Commerce issued or any time Commerce starts having doubts about the evidence Commerce possesses. Under such a scheme the whole administrative process would not only lose any time frame and due process constrains but would effectively become a carte blanche in the hands of an agency.

The Court presumes that the reason for Commerce's misreading of the scope of the remand is the Court's instruction to "take further actions not inconsistent with [the Court's] opinion." *Consolidated Bearings*, 25 CIT at ____, 166 F. Supp. 2d at 593. It seems that Commerce read this language as a requirement to devise alternative approaches (or rates) for Consolidated Bearings' import of FAG Kugelfischer's merchandise. *See Remand Results* at 3, 6.

Commerce is in error. Under the language of the September 9, 1997, liquidation instructions and Commerce's actions within a year after the issuance of these instructions, all Consolidated Bearings' imports of FAG Kugelfischer's merchandise during the period of review should be liquidated in accordance with the September 9, 1997, liquidation instructions only. Courts omit spelling out the particular technical actions to be taken by an agency because courts are in privy with only a limited amount of evidence and, thus, are unfamiliar with particularities of the transactions under review.

For example, if the language of the September 9, 1997, liquidation instructions allows: (1) different modes of liquidation; and (2) such different modes were actually utilized by Customs right after Customs' receipt of the September 9, 1997, liquidation instructions with regard to parties other than Consolidated Bearings, Commerce could have instructed Customs to choose among these modes of liquidation.[1] Alternatively, because "Consolidated[] [Bearings'] entries were not reviewed" during the review at issue, and Commerce "do[es] not have any information about the kinds of [merchandise] Consolidated [Bearings] entered during the period," *Remand Results* at 5, Commerce could instruct Customs to liquidate Consolidated Bearings' import of FAG Kugelfischer's merchandise in accordance with the September 9, 1997, liquidation instructions, while ordering the liquidation of all other Consolidated Bearings' merchandise under another applicable determination which Commerce believes is applicable (provided such other determination was duly rendered[2] and it was feasible for Commerce to devise a methodology of separating Consolidated Bearings' imports of FAG Kugelfischer's merchandise and other Consolidated Bearings' imports during the period of review). If in such a case, as unlikely as it may be, the identity of the merchandise manufacturer would become an issue, the Court could entertain Commerce's reasonable methodology determining which Consolidated Bearings' imports are of FAG Kugelfischer's merchandise and which are not. Bearing in mind that it was Commerce and not the Court that was charged with a duty to familiarize itself with all the particular circumstances of the transaction and apply

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[1] Indeed, such a supposition seems unlikely. Commerce, however, stated that alternative readings of the September 9, 1997, liquidation instructions were plausible. *See Consolidated Bearings*, 25 CIT at ___, 166 F. Supp. 2d at 592. While the possibility of alternative readings could serve as a basis for a vagueness attack by Consolidated Bearings', no such claim was entered by the plaintiff.

[2] Any liquidation of Consolidated Bearings' merchandise without prior proper determination by Commerce would be a violation of administrative process and Consolidated Bearings' procedural due process rights.

the law, the Court issued Commerce a legal, rather than technical, mandate in *Consolidated Bearings*, 25 CIT ____, 166 F. Supp. 2d 580.

However, because Commerce neither took nor suggested taking any further actions with regard to Consolidated Bearings' imports of FAG Kugelfischer's merchandise that would abide with Commerce's September 9, 1997, liquidation instructions, it is hereby

ORDERED that the *Remand Results* filed by Commerce on November 6, 2001, are vacated; and it is further

ORDERED that this case is remanded to Commerce to liquidate all Consolidated Bearings' imports of FAG Kugelfischer's merchandise imported during the period of review in accordance with the September 9, 1997, liquidation instructions; and it is further

ORDERED that the remand results are due within ninety (90) days of the date that this order is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date the responses or comments are due.

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